Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JON ECHEVARRIETA,
Petitioner,

vs.

THE CITY OF RANCHO PALOS VERDES, a Municipal Corporation; THE CITY OF RANCHO PALOS VERDES CITY COUNCIL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
SECOND APPELLATE DISTRICT
DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

ROBERT HAMPTON ROGERS
Counsel of Record

SULLIVAN, WORKMAN & DEE, LLP

800 South Figueroa Street
Twelfth Floor
Los Angeles, California 90017
(213) 624-5544

Attorneys for Petitioner
JON ECHEVARRIETA

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88 pp

QUESTIONS PRESENTED

This case presents rarely litigated questions on view ordinances and the takings issue:

Does the City of Rancho Palos Verdes' enforcement of a view ordinance which changes long established state property and nuisance laws by requiring the destruction of Petitioner's thirty year old trees to grant a view to another property owner, constitute a taking in violation of the Fifth and Fourteenth Amendments of the United States constitution?

and

Does the City of Rancho Palos Verdes' view ordinance go too far in its forty year retroactive reach and its intolerance for existing lawful non-conforming uses, thus violating the Fifth and Fourteenth Amendments of the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner herein, Jon Echevarrieta is the Petitioner and tree owner and the Plaintiff below. Respondents are City of Rancho Palos Verdes, A Municipal Corporation and the City of Rancho Palos Verdes City Council.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Four, entered in this case on January 3, 2001 and certified for publication on January 18, 2001.

OPINIONS BELOW

The January 3, 2001 decision of the Court of Appeal of the State of California reported at 86 Cal.App.4th 472. is reproduced herein as Petitioner's Appendix A.

The March 21, 2001 order by the California Supreme Court denying review appears as Petitioners Appendix B.

The trial court's order on Petitioner's Writ of Mandate entered by the Superior Court of California, County of Los Angeles on November 19, 1999, in this same action is reproduced herein as Petitioner's Appendix F.

Finally, the Administrative decision rendered by the City of Rancho Palos Verdes View Restoration Commission and approved by the City of Rancho Palos Verdes City Council in the form of Resolution 98-21, is reproduced herein as Petitioner's Appendix G.

JURISDICTION

The Court of Appeal denied Petitioner's timely Petition for Rehearing on January 30, 2001. (See Appendix D.)

The California Supreme Court denied Petitioner's timely Petition for Review on March 21, 2001 and on April 23, 2001, the decision of the Court of Appeal of the State of California for the Second Appellate District became final. (See Remittitur, Appendix E.)

Based on the above facts, this Court has jurisdiction pursuant to 28 U.S.C. § 12257(a) because this petition seeks review of a final judgment of a state court which has decided the important federal question of Petitioner's entitlement to just compensation under the United States Constitution in a way that conflicts with other relevant decisions of this court.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides that:

> "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United

States Constitution provides that:

> "Section1 . . . nor shall any State deprive any person of life, liberty or property without due process of law."

THE CITY ORDINANCE

The City of Rancho Palos Verdes Ordinance 17.02.040, at 2 a. through f. is attached hereto as Appendix H.

STATEMENT OF THE CASE

This action concerns Respondent City of Rancho Palos Verdes' ("the City") adoption and enforcement of a view ordinance. The effect of the ordinance is that Petitioner will lose three mature trees and will not be compensated for the loss of his trees.

In codifying the original ballot measure Proposition M, the City simply made a mistake: the Ordinance fails to acknowledge the loss of trees and to provide a fair and rational method of compensation for the tree owners' loss of trees. This has resulted in an unfair, city-wide removal of mature trees, forcing tree owners throughout the City to lose their property for the benefit of a few view seekers.

As a result, throughout the city there are

now homes with ravaged, bare, exposed yards consisting largely of stumps.

A. THE ORDINANCE

The ordinance, as applied by the City of Rancho Palos Verdes View Restoration Commission ("VRC") and the City of Rancho Palos Verdes City Council, will require that three of Petitioner's thirty year old pine trees be reduced to five foot stumps, thus killing the trees and destroying the park-like enclave of privacy, peace and quiet that Petitioner has cultivated and created since he purchased the newly created lot in 1964.

To fully understand the magnitude of the reach and effect of the City of Rancho Palos Verdes view ordinance 17.02.040 one must go back to a time when the Palos Verdes peninsula consisted primarily of rolling hills of coastal sage and chaparral.

In 1964, at the time of the creation of the lots in question, all of the lots were graded and barren of landscaping. In those early years residents were encouraged to landscape their properties and plant trees.

Now, years later, the City of Rancho Palos Verdes, whose very name ironically means "Ranch of Green Trees" in Spanish, has reversed its

position and declared that all trees over 16 feet in height which block a view and which did not exist at the time of the creation of the lot must be either trimmed or removed upon application for a view permit under Ordinance 17.02.040.

Throughout the City hundreds of mature trees have been removed–leaving countless homeowners with barren, exposed yards with large tree stumps.

B. THE CONSEQUENCES OF THE CITY'S APPLICATION OF THE ORDINANCE

The City of Rancho Palos Verdes ("City") has issued a resolution which requires that Petitioner "top" three of his thirty year old pine trees which range in height from 40 to 60 feet, to the level of the view applicant's pad. This means that the trees will be reduced to five foot tall stumps and will die.

The view applicant, Petitioner's back yard neighbor, is required to pay for the cost of topping and trimming if Petitioner consents, and to pay for replacement foliage consisting of not more than 20 to 25 one gallon "low growing shrubs."

If Petitioner does not consent, then the City will enter his property, top the trees leaving five foot stumps and bill Petitioner for the work.

C. PETITIONER SHOULD BE COMPENSATED FOR THE LOSS OF HIS TREES

Petitioner contends that the City's application of the view ordinance violates the takings clause of the United States constitution because:

1. The ordinance defeats Petitioner's reasonable expectations under the state's property laws by forcing Petitioner to bear the burden of the City's view policy by removing his trees without just compensation; and

2. The ordinance goes too far in its retroactive reach and it's regulation of use.

REASONS WHY THE WRIT SHOULD ISSUE

This case is appropriate for review because the opinion rendered by the appellate court in this matter holds that a municipality's removal or destruction of mature forty year old trees is equivalent to such other zoning regulations as density controls, building usage, lighting and parking conditions.

If allowed to 'stand, the appellate court's holding will enable municipalities to exercise their police powers to effect physical takings of private property under the guise of zoning. Such a ruling

controverts not only established takings analysis but also laws regarding retroactive application of ordinances and legal non-conforming uses.

A. THE APPELLATE COURT'S HOLDING CONFLICTS WITH THE PRINCIPLES ENUNCIATED BY THIS COURT IN *LUCAS v. SOUTH CAROLINA COASTAL COMMISSION*

When Petitioner purchased a newly created tract of land forty years ago and then proceeded to landscape the bare land with trees and other foliage, he could not have foreseen that the settled law of quiet enjoyment of property, California Civil Code §829 (which provides that a fee owner of land has the right to the surface and to everything permanently situated beneath or about it), and the general rule in California that landowners do not have a natural right to air, light or an unobstructed view (*Pacifica Homeowners' Association v. Wesley Palms Retirement Community et al.*, 178 Cal. App.3d 1147, 1151 (1986); *Katcher v. Home Savings & Loan Assoc.*, 245 Cal.App.2d 425, 429-430 (1966) would all be overturned and preempted by a local Rancho Palos Verdes view ordinance.

Since this court's decision in *Lucas v. South Carolina Coastal Commission*, 505 U.S.1003 (1992), a municipality is required to identify the "background principles of nuisance and property law that prohibit" the uses intended by a property owner whose property is subject to a new regulation. In order for the municipality to fairly claim that the view ordinance takes nothing, it must identify the relevant state property and nuisance principles which proscribe Petitioner's use. (*Lucas, supra*, 1031.)

In setting forth these principles, this Court in *Lucas*, was affirming and clarifying the position of this Court in past decisions, such as that enunciated in Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 297, 298 (1967).

In *Hughes*, a pre-*Lucas* case, where a landowner held title to accretions to her ocean front property under a pre-statehood Federal grant, and was deprived of title to same by reason of a Washington State constitutional provision which provided that such ocean accretions belonged to the state, the court stated that Washington State, instead of proceeding by eminent domain, simply legislated a retroactive transformation of private property into public property without paying for the privilege of doing so.

> "As is so often the case when a State exercises its power to make law, or to regulate . . . pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." (*Hughes*, 298)

What the City has done here is to order that Petitioner either remove his trees, or submit to a court order authorizing the City to enter Petitioner's property to abate a nuisance and "top" his trees, leaving five foot stumps, or in the words of the Rancho Palos Verdes City Council, "telephone poles," standing.

As in *Lucas* at 1031, in order for the City to fairly claim that the view ordinance takes nothing, it must identify the relevant state property and nuisance principles which proscribe Petitioner's use. The only justification put forth by the City is its right to exercise its police powers for the aesthetic benefit of the community as a whole pursuant to *Kucera v. Lizza*, 59 Cal. App 4th 1141 (1997).

The right of the City to legislate community aesthetics is not questioned here. However, to the extent that the ordinance constitutes a sudden

change in state law, unpredictable in terms of the relevant precedents, and when the impact of that change is to deprive Petitioner of property or rights that were legally his previous to the change in law, a taking occurs. (See *Hughes*, 297, 298) The case of *Kucera v. Lizza* held only that a view ordinance which sought to preserve and perpetuate views was a valid exercise of the City's police power, it did not decide the takings issue.

It is well settled that under California law, there is no right to a view. In *Peter B. Venuto v. Owens-Corning Fiberglas Corporation*, 22 Cal. App. 3d 116 (1971), where Plaintiff Venuto sought to have Defendant Owens-Corning's activities declared a nuisance, claiming that the smoke from Defendant Owens-Corning's factory obscured his view, the court held that obstruction to view is not encompassed within the definition of nuisance:

> ". . .the rule articulating that the mere obstruction of view or the mere interference with the passage of light and air by a building or structure does not amount to a nuisance applies equally to an obstruction or interference caused by the emission of smoke . . . provided such emission does not otherwise constitute a nuisance."

Similarly in *Katcher v. Home Savings & Loan*

Assoc., 245 Cal.App.2d 425, the court stated that:

> "It has long been established in this state that a landowner has no easement over adjoining land for light and air in the absence of an express grant or covenant" *(Katcher*, 429)

Thus Petitioner's property was not subject to a view easement or to any restrictions on landscaping.

The above view, as articulated by the California court, is also the clear majority rule in other jurisdictions. (See Nebraska: *Kruger v. Shramek*, 5 Neb. App. 802 (1997), citing Missouri: *44 Plaza, Inc. v. Gray-Pac Land Co.*, 845 S.W.2d 576 (Mo. App. 1992); Washington: *Collinson v. John L. Scott, Inc.*, 55 Wash. App. 481 (1989); Iowa: *Mohr v. Midas Realty Corp.*, 431 N.W.2d 380 (Iowa 1988); Texas: *Scharlack v. Gulf Oil Corporation*, 368 S.W.2d 705 (Tex. Civ. App. 1963); Indiana: *Wolf et al. v. Forcum et al.*, 130 Ind. App. 10 (1959).)

Given the long established and uncontroverted law that no landowner has a natural right to a view, Petitioner herein was justified in investing his money and time in an extra large lot with a slope and landscaping his lot with the trees which now flourish in his back yard.

The City's action pursuant to the ordinance interferes with Petitioner's reasonable investment expectation that he would enjoy the trees that he had spent over thirty years cultivating and nurturing from saplings to maturity–the privacy the trees create, the energy savings that the trees facilitate; the protection from sun and wind that they provide. The City's resolution calls for replacement foliage consisting of 20-25 one gallon shrubs–not an adequate replacement for mature 40-60 foot trees.

Upon one property owner's application for a view permit, not only would the City forcibly create a view easement over another's private property, but it would also declare all view obstructing trees over 16 feet in height on that property a nuisance because they violate a city ordinance.

There is no precedent in California law which declares that healthy trees, even if they obstruct a view, are a nuisance. The City's ordinance, together with the case of *Kucera v. Lizza*, changes this law by declaring Petitioner's trees a nuisance, subject to destruction by the City unless Petitioner removes the trees on his own.

Insofar as it constitutes a sudden change in established state law, the City's view ordinance flies in the face of the principles upheld in *Hughes* and *Lucas*, and as applied to Petitioner, takes his

trees without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. THE APPELLATE COURT'S OPINION THAT THE ORDINANCE IS A LEGITIMATE EXERCISE OF THE CITY'S POLICE POWER CONFLICTS WITH ESTABLISHED FEDERAL PRECEDENTS REGARDING RETROACTIVE LEGISLATION

The City's view ordinance seeks to create views that existed at the time of the creation of the lots. In Petitioner's case, the retroactive reach of the ordinance is nearly forty years. The retroactive reach of the ordinance and the attendant height limitations endanger all mature tree growth within the City of Rancho Palos Verdes.

This court, in *Eastern Enterprises v. Apfel* 524 U.S. 498,522 (1998), set forth the analytic criteria for determining when the retroactive application of a law constitutes a taking: (a) what is the economic impact of the regulation; (b) how does it interfere with reasonable investment backed expectations; (c) is the character of the government action such that fairness requires

compensation, and in determining the fairness of the government action, (d) what is the distance into the past of the retroactive reach of the ordinance and (e) what is the magnitude of the liability imposed. *Eastern Enterprises, supra,* at 523-524.

The Appellate Court recited the above referenced factors, but then failed to make any analysis in accordance with those factors and ignored the two factors set forth in *Eastern* as a test for the fairness of a government's actions. After stating the relevant factors, the Appellate Court ignored its own words and merely concluded that there was no "per se" taking. (Appendix A, 11-12).

Petitioner argues that he will suffer an adverse economic impact: he will lose the value of his trees and the will be required to begin landscaping his backyard all over again, nurturing saplings to maturity. The 20-25 one gallon plants which the City ordered as replacements are hardly substitutes for mature forty year old, 40 to 60 foot trees.

Petitioner further argues that his reasonable expectations are defeated: he invested the time and money in cultivating his trees for forty years.

And Petitioner finally argues that the character of the government action is to either

force him to remove his trees or send agents in with chains saws to "top" his trees.

The Court of Appeals made no determination on whether the destruction of trees pursuant to the retroactive application of a view ordinance constitutes a taking except to state that landowners with trees are allowed to keep foliage at the height that existed on the effective date of the ordinance until application is made to restore a view, and therefore the government action is fair since there is no *automatic* retroactive reach of the ordinance. (Appendix A, 16.)

In Petitioner's case, and of necessity in all cases in the City of Rancho Palos Verdes, the City will, upon application for a view permit, resolve to remove mature trees. This is because the City seeks to create views that existed at the time of the creation of the lot–and there were virtually no trees in the City of Rancho Palos Verdes at the time of the creation of the lots. The retroactive reach of the ordinance is thus automatic once application is made for a view permit.

This case will be one of only a few published decisions on the takings issue with respect to enforcement of view ordinances and it will not have addressed any of the elements in classical takings analysis. There are no answers to the questions:

1. What is the economic impact of the regulation on Petitioner and all those tree owners similarly situated;

2. How does the ordinance interfere with Petitioner's and other tree owners' reasonable investment backed expectations–the forty years of nurturing and cultivating trees to maturity; and

3. What is the character of the government action? How fair is it for a municipality to order that trees be removed and replaced with one gallon shrubs?

4. What is the retroactive reach of the ordinance? Is reaching back to recreate views that existed forty years ago going too far?

5. What is the magnitude of liability imposed on Petitioner and those similarly situated? What is the value of three forty year old pine trees. What is the value of the hundreds of trees that have already been taken by the city?

6. And finally, are Petitioner and those similarly situated being forced to bear the burden of the City of Rancho Palos Verdes' view preservation and restoration policy, which burden should be borne by the public as a whole?

Petitioner and those similarly situated deserve answers to these questions–answers

which the Appellate Court fails to give.

C. THE APPELLATE COURT'S OPINION THAT THE ORDINANCE IS A LEGITIMATE EXERCISE OF THE CITY'S POLICE POWER CONFLICTS WITH ESTABLISHED PRECEDENTS REGARDING ZONING AND NON-CONFORMING USES

The court of appeals not only declined to make a takings analysis with respect to the ordinance's retroactive application, but characterized the ordinance as a "traditional land use regulation," insisting that Petitioner was only required to "trim" his trees (Appendix A, 14), much like "building set backs, parking and lighting conditions and landscaping requirements." (Appendix A, 13.)

As applied by the City, the ordinance seeks to remove a pre-existing non-conforming use, in derogation of established law that a change in use does not render illegal a prior lawful nonconforming use. (See *Browning-Ferris Industries v. Maryland Heights*, 747 F. Supp. 1340, 1348 (1990), U.S. District Court, Eastern District of Missouri and *Edmonds v. County of Los Angeles*, 40 Cal. 2d 642, 651 (1953).)

Petitioner asserts that his trees are a prior lawful non-conforming use, and should either be protected from the retroactive reach of the Ordinance or should be adequately compensated for if removal is required.

The court of appeals in this case dismissed Petitioner's argument that his trees constituted a prior lawful non-conforming use by stating that:

> "Appellant cannot show he has a vested right to foliage of a certain height. . . . " (Appendix A, 14.)

The Appellate Court's statement would be correct if Petitioner was arguing for compensation for the right to grow trees to a certain height.

But this is not what Petitioner is arguing. Petitioner is arguing that he will suffer economic loss equal to the value of his trees, that his legitimate investment backed expectations have been thwarted by an unfair and overreaching government action–the creation of views that have not existed for forty years.

In other words, Petitioner is arguing a taking of his trees, not his right to grow tall trees.

The City's and the Appellate Court's assertion that the view ordinance is a zoning ordinance and merely regulates use dismisses

long established zoning regulation analysis, which holds that "The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected." A new zoning ordinance does not generally render illegal a prior lawful nonconforming use. (*Browning-Ferris Industries, Inc. v. Maryland Heights,* 747 F. Supp. 1340 (1990, U.S. Dist., Eastern District of Missouri); *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 551-552; *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 651.)

Just as a compensable taking would occur if an ordinance placing a one story height limit on buildings required all non-conforming buildings to remove anything above the first story, so the issuance of a view permit pursuant to the View Ordinance which suddenly requires the removal of Appellant's non-conforming trees constitutes a compensable taking.

A city may not effect a taking through an overly zealous effort to eliminate an existing nonconforming use. Instead of violating due process by applying an ordinance retroactively a city must pursue two constitutionally equivalent alternatives:

> "It can eliminate the use immediately by payment of just compensation, or it can require removal of the use

without compensation following a reasonable amortization period."

Metromedia, Inc. v. City of San Diego (1980) 26 Cal.3d 848, 881; See also *E.B. Elliot Adv. Co. v. Metropolitan Dade County,* 425 F2d 1141, 1155 (5th Cir. 1970) and *Outdoor Graphics v. City of Burlington,* 103 F.3d 690, 695 (8th Cir. 1996).

The City in its retroactive application and enforcement of the view ordinance exhibits an unconstitutional intolerance for non-conforming uses: due process requires that the City either pay or be more patient in seeking change by regulation.

Appellant's trees are a prior lawful non-conforming use, and should either be protected from the retroactive reach of the Ordinance or, if removal is required, should be adequately paid for with just compensation.

CONCLUSION

In its enforcement of the view ordinance the City of Rancho Palos Verdes proposes to cut three mature trees down to five foot stumps, leaving them to die. As a result of the City's actions Petitioner's backyard environment will be destroyed along with Petitioner's reasonable investment expectations.

Instead of paying for change or waiting to phase in change, the City seeks to regulate it's citizens into a forced, immediate change. In doing so, the City's application of the ordinance goes too far. The City is:

> "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co. v. Mahon* 260 U.S. 393, 415 (1922).)

Petitioner respectfully requests that this court review this case and determine whether view ordinances such as Rancho Palos Verdes Ordinance 17.02.040 do in fact violate the Fifth and Fourteenth Amendments to the United States Constitution by going too far.

DATED: June 15, 2001

Respectfully submitted,

ROBERT HAMPTON ROGERS
Counsel of Record

SULLIVAN, WORKMAN & DEE, LLP

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

COURT OF APPEAL - SECOND DIST.
F I L E D
JAN 03 2001
JOSEPH A. LANE . . . . . .Clerk
. . . . . Deputy Clerk

JON ECHEVARRIETA,
Plaintiff and Appellant

v.

THE CITY OF RANCHO PALOSVERDES, et al.,
Defendants and Respondents.

B138366
(Super. Ct. No. YS006446)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jean E. Matusinka, Judge. Affirmed.

Sullivan, Workman & Dee and Robert Hampton Rogers for Plaintiff and Appellant.

Carol W. Lynch, City Attorney of the City of Rancho Palos Verdes; Richards, Watson & Gershon, T. Peter Pierce and Gregory M. Kunert for Defendants and Respondents.

Jon Echevarrieta (appellant) appeals from a judgment entered in favor of respondents the City of Rancho Palos Verdes (the City) and the City of Rancho Palos Verdes City Council (the City Council) after the trial court denied appellant's petition for writ of mandate. At issue is a "view protection" ordinance of the City. We affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Ordinance

Voters in the City approved Proposition M on November 7, 1989. It was codified in section 17.02.040 of the Rancho Palos Verdes Municipal Code (hereinafter referred to as the Ordinance), and was most recently amended in January 1997.

In pertinent part, the Ordinance prohibits residents of the City from significantly impairing a view by permitting foliage to grow to heights exceeding certain height limitations. If foliage in existence already exceeds those height limitations, the person whose view is impaired must first attempt to informally resolve the matter with the person who owns the foliage, and if that fails, may apply for a "view restoration permit." Hearings on the application for the permit are conducted by a View Restoration Commission (VRC), a committee of seven members appointed by the City Council. The VRC may grant the permit only if certain specified findings are made. If the VRC orders any foliage trimmed or removed, or replacement foliage is ordered planted, the costs are to be borne by the permit applicant. Any interested party may appeal the VRC's decision to the City Council.

The Application Process

Since 1966, Norbert Keilbach has lived on Greve Drive in the City. His home faces south towards the Pacific Ocean and Catalina Island. Appellant lives on Ganado Drive, on a slope directly below Keilbach's home. Appellant has several trees which are near the border of his property and Keilbach's which purportedly block

Keilbach's view of the ocean and Catalina Island.[1] Appellant purchased his property in 1964. The trees did not exist prior to the establishment of either Keilbach's or appellant's lots.

In February 1997, Keilbach filed an application with the City in order to compel appellant to trim trees that interfered with his view.

On May 1, 1997, a public hearing was held in connection with the view restoration application. Both appellant and Keilbach appeared. At the conclusion of the hearing, the VRC adopted Resolution No. 97-5, requiring that appellant remove the three pine trees, and to trim the tops of five other trees, at the expense of the applicant, Keilbach.

On May 16, 1997, appellant appealed the VRC's decision to the City Council. The City Council heard the appeal at its public meeting on July 1, 1997, and remanded the matter to the VRC for further consideration of the effect that trimming the trees would have on appellant's privacy.

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[1] There are eight trees which are the subject of the dispute: 2 pine trees which measure approximately 40 feet, 1 pine tree which measures approximately 60 feet, 1 pine tree which measures approximately 20 feet, 1 ash tree measuring approximately 40 feet, 1 olive tree which measures 40-50 feet, 1 ornamental plum tree which measures 20 feet and 1 scrub oak tree which measures 40-50 feet.

The VRC held another public hearing on the application on October 2, 1997. At the conclusion of this hearing, the VRC ordered its staff to prepare for adoption at the next meeting a resolution requiring appellant to trim his trees.

On November 6, 1997, the VRC approved Resolution No. 97-22. This resolution required appellant to trim eight of his trees but also required Keilbach to plant a barrier of no more than 20 to 25 low-growing shrubs between his property and appellant's to mitigate appellant's privacy concerns.

Appellant appealed this decision to the City Council. On March 17, 1998, the City Council heard the appeal during its public meeting.

On April 7, 1998, the City Council adopted Resolution No. 98-21, affirming the VRC's approval of the view restoration permit application and requiring appellant to trim eight of his trees. Appellant then filed this lawsuit in Superior Court.

Proceedings in Superior Court

Appellant filed his "Petition for writ of mandate; complaint for declaratory relief, taking[,] spot zoning and attorney's fees" on June 17, 1998. In his complaint, he alleged that the City and the City Council abused their discretion in affirming the decision of the VRC to issue the view restoration permit, that the City and the City

Council failed to grant him a fair trial, that the affirmance of the approval of the view restoration permit constituted a taking without just compensation in violation of the Fifth Amendment, and that "[b]y its enactment of the view restoration ordinance, the City has actively engaged in a species of illegal spot zoning," that is, the "unreasonable, arbitrary and discriminatory" classification of property by the enactment of unreasonable and arbitrary regulations pertaining to certain uses or classifications of property. He sought declaratory relief on two grounds: (1) that the ordinance is unconstitutional because it conflicts with state easement law and violates individual property rights and (2) that the view blockage cannot be declared a public nuisance. He also sought an award of attorney fees.

The matter came on for trial on May 4, 1999. Appellant failed to appear and the court ordered the matter dismissed. Appellant's subsequent motion to set aside the dismissal was granted and the matter was re-set for trial on August 30, 1999. The matter was ultimately submitted on October 12, 1999, and on November 19, 1999, the trial court denied the petition. It ruled, in pertinent part, "The view restoration ordinance is a valid exercise of the city's police power and is not preempted by state law. [¶] In light of the whole record, there is substantial evidence which supports the findings contained in Resolution 98-21 and the findings that support the City Council's decision. [¶] Uncontradicted

evidence in the record show[s] that the plaintiff had reasonable notice of the City Council's public hearings regarding his property and was given reasonable opportunity to be heard. Plaintiff's due process rights were not violated. [¶] *[Kucera v. Lizza* (1997) 59 Cal.App.4th 1141]." Appellant filed a notice of appeal on January 5, 2000.

On March 3, 2000, the City obtained from the Superior Court a warrant authorizing entry upon appellant's property "for the sole and exclusive purposes of trimming, culling, and lacing trees and foliage." On March 10, 2000, appellant obtained a 90-day stay of execution upon the warrant. Appellant filed a petition for writ of supersedeas on June 8, 2000. We denied that petition on June 9, 2000.

DISCUSSION

On appeal, appellant addresses five issues: (1) the trial court erred in relying upon *Kucera v. Lizza;* (2) the ordinance violates the takings clause; (3) retroactive application of the ordinance deprives him of due process; (4) the ordinance is deceptive and uncertain; (5) as applied, the ordinance impermissibly expands the City's police power. We first address issues (1) and (5).

1. Kucera v. Lizza and the City's Police Power

In *Kucera v. Lizza, supra,* 59 Cal.App.4th 1141, the Court of Appeal considered the validity

of an ordinance of the Town of Tiburon similar to the ordinance presented here. The stated purpose of the Tiburon ordinance was to establish "the right of persons to preserve views or sunlight which existed at any time since they purchased or occupied a property from unreasonable obstruction by the growth of trees" and to establish a process to achieve restoration of views and sunlight. (Tiburon Muni. Code, § § 15.1.A and B.) In accord with the provisions of the ordinance, the Kuceras petitioned for informal dispute resolution with respect to trees located on the downhill lot across the street, property owned by Lizza. The Kuceras claimed the trees obstructed their views of the San Francisco Bay and the Marin County mainland. Lizza refused to participate in the process. The Kuceras filed a complaint in superior court seeking to compel restoration of their views and for abatement of a public nuisance. The trial court entered judgment in favor of Lizza concluding that the ordinance was unconstitutional and void because it was preempted by state law and was an arbitrary and unreasonable exercise of the police power.

The Court of Appeal reversed: "It is well settled that the state may legitimately exercise its police powers to advance aesthetic values.... The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. [Citations.] . . . [¶ We hold the Tiburon ordinance is directed toward a valid police power goal--to

preserve views and sunlight. Tiburon's choice of regulating obstructing trees and tree growth obviously bears a reasonable relationship to the achievement of those goals. [Citation.]" (*Id.* at pp. 1148-1149, internal quotation marks omitted.)

Here, appellant contends that the Ordinance does not state a valid purpose because it states only that "the peace, health, safety and welfare of the community will be served by the adoption of this section." We disagree.

The ballot measure which was approved by the voters states the purposes of the Ordinance as follows: "The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City. The hillsides provide potential vista points and view lots. The City's General Plan recognizes these natural resources and calls for their protection. The public health, safety and welfare of the City require prevention of needless destruction and impairment of these limited vista points and view lots....[¶] Specifically, this Ordinance: [¶] 1. Protects, enhances and perpetuates views available to property owners and visitors because of the unique topographical features of the Palos Verdes Peninsula. These views provide unique and irreplaceable assets to the City and its neighboring communities.... [¶] 2. Defines and protects finite visual resources by establishing limits which construction and plant growth can attain before encroaching onto a view. [¶] 3. Insures that the

development of each parcel of land or additions to residences or structures occur in a manner which is harmonious and maintains neighborhood compatibility and the character of contiguous sub-community development as defined in the General Plan." These purposes were reprinted in the View Restoration Permit Guidelines and Procedures issued by the City.

Enacting the ordinance for these purposes is a clearly a legitimate exercise of the city's traditional police power. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886; *Kucera, supra*, 59 Cal.App.4th at p. 1149.) To the extent that the trial court cited *Kucera* for this proposition, it did not err.

2. The Takings Issue

We agree that the *Kucera* case is not dispositive of appellant's takings claim. The opinion specifically remanded the matter for further proceedings on this issue: "The takings authorities cited by the parties are, of course, not directly pertinent. This is a facial challenge and, while it is hard to imagine on this record how compliance with the ordinance and resultant tree trimming might result in an unconstitutional taking, any such argument will have to await a remand and further proceedings." (*Id.* at p. 1154.) Here, appellant contends that the ordinance is invalid "as applied," raising the taking issue.

The Takings Clause of the Fifth Amendment to the federal Constitution provides "[N]or shall private property be taken for public use, without just compensation." "The aim of the Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness' and justice, should be borne by the public as a whole.' *(Armstrong v. United States* [(1960) 364 U.S. 40, 49].)" *(Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 522.) Similarly, the California Constitution at article I, section 19, provides that "[p]rivate property may be taken or damaged for public use only when just compensation ... has first been paid. . . ."

A party challenging a governmental action as an unconstitutional taking bears a substantial burden. *(Eastern Enterprises, supra,* at p. 523.) Not every destruction or injury to property by the government has been held to be a taking. *(Armstrong, supra,* at p. 48.) The process for evaluating the constitutionality of a governmental action involves an examination of its "justice and fairness," for which there is no set formula, and the inquiry is "essentially ad hoc and fact intensive." *(Eastern Enterprises, supra,* at p. 523.) Several factors which have been held to be particularly significant are: (1) the economic impact of the regulation; (2) its interference with reasonable investment backed expectations; and (3) the character of the governmental action. *(Eastern Enterprises, supra,* at pp. 523-524.)

There are two types of regulatory action which have been adjudicated to be "per se" takings without the necessity of weighing the public interest advanced in support of the restraint. Those are: (1) where the property owner has suffered a physical invasion of his property and (2) where the regulation denies all economically beneficial or productive use of land. *(Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.)

Contrary to appellant's arguments, the Ordinance does not itself compel a physical invasion of appellant's property. Rather, it is appellant's refusal to comply with Resolution No. 98-21, after ample notice and opportunity to correct, that has occasioned the threat of the City's entry onto the property. It does not therefore, rise to the level of a physical invasion. *(Yee v. City of Escondido* (1992) 503 U.S. 519, 527; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 7, 12; *Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, 1358.)

Likewise, we find unavailing appellant's attempt to analogize this case to *Lucas v. South Carolina Coastal Council, supra,* 505 U.S. 1003 as a denial of his "reasonable investment backed expectations." In *Lucas*, the purchaser of two lots zoned for residential use was later precluded by state legislation from erecting *any* permanent habitable structures on the lots. Unlike the plaintiff in *Lucas*, appellant here is not deprived of

any significant economically beneficial use of his land.

Here, while the City has imposed limitations on the height of pre-existing foliage, it is a legitimate exercise of police power which does not rise to the level of a taking. Contrary to "per se" takings, "traditional land-use regulations" such as the imposition of minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions "have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property. [Citations.]" *(Ehrlich v. City of Culver City, supra,* 12 Cal.4th at p. 886; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 518 ["[A] zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging. . . ."].) "The denial of the highest and best use does not constitute an unconstitutional taking of property. [Citation.] 'Even where there is a very substantial diminution in the value of land, there is no taking. . . .' ([*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 103 6].)" *(Ramona Convent of the Holy Names v. City of Alhambra* (1993) 21 Cal.App.4th 10, 23.)

It is even questionable whether there has been a diminution in the value of the land. Appellant cites the damage to his property as his loss of privacy and "utility saving cooling shade."

Appellant cannot show he has a vested right to foliage of a certain height or to a fixed amount of utility charges. In addition, appellant has not been ordered to destroy his trees, but simply to trim them. The City's resolution provides that the cost of the tree removal is to be borne by Keilbach and that reasonable replacement shrubbery is also to be purchased by him. If any of the trees or shrubs that is ordered trimmed dies within one year, Keilbach is to bear the expense of a replacement tree or shrub. Therefore, appellant is being fairly compensated for any damage to his trees.

While appellant cherishes his park-like privacy, the regulation of tree heights throughout the city may indirectly increase the property's value, as the city becomes known for one which has scenic vistas. (See *HFH, Ltd. v. Superior Court, supra, 15* Cal.3d at pp. *520-521.)* As for the loss of his privacy, the VRC made a specific finding, after visiting Keilbach's property, that there was no unreasonable infringement of appellant's privacy "since the subject trees limit but do not totally eliminate all viewing onto the foliage owner's property from the applicant's property."

Accordingly, we find no taking as contemplated within the Fifth Amendment of the United State Constitution or article 1, section 19 of the California Constitution.

3. *Due Process Claims*

a. *Retroactive Application*

Appellant contends that retroactive application of the ordinance amounts to irrational and arbitrary action. He also argues that the ordinance allows view seekers to exact retribution against foliage owners and that the VRC did not appropriately balance the interests of the two property owners. In support of these argument, he cites *Eastern Enterprises v. Apfel, supra, 524 U.S. 498.*

In *Eastern*, a company that formerly was in the coal mining business left that industry. Several years later, the Coal Industry Retiree Benefits Act was enacted, providing for assigned benefits to retirees in the coal industry. The effect of this Act was to impose $50 to $100 million worth of liability on the company based on its activities 30 to 50 years earlier. *(524 U.S.* at pp. 503, 516-517.)

The company sued, claiming there was a taking and a violation of Due Process rights. (524 U.S. at pp. 517, 529.) In concluding that the company's claims had merit, the Supreme Court

noted that retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions. (*Eastern, supra,* at pp. 532, 533.) The Court concluded that the length of time that the Coal Act reached back to impose liability on the company and the magnitude of the liability raised substantial fairness question.

Here, there is no automatic retroactive reach of the ordinance. Homeowners are allowed to keep foliage at the height it existed on the effective date of the Ordinance. It is only when another homeowner applies for a view restoration permit that the inquiry begins whether the foliage must be trimmed to a lower height. (See discussion, *infra,* on vagueness claim.)

In addition, there is no showing that the ordinance was applied in an arbitrary or irrational manner. (*United States v. Carlton* (1994) 512 U.S. 26, 32.) The ordinance requires first resort to informal dispute resolution and provides for noticed hearings and rights of appeal. Keilbach and the City Council duly followed all the required steps. There is no factual basis for appellant's contention that the City or the VRC acted with an improper motive. In fact there is no reason given by appellant for Keilbach's actions against appellant other than view restoration.

b. *Uncertainty*

Appellant contends that the ordinance is so unclear that it violates due process. He cites *Ross v. City of Rolling Hills* (1987) 192 Cal.App.3d 370, 375, for the tests for vagueness challenge as follows: (1) the statute must not forbid nor require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application; (2) the language must be definite enough to provide a standard of conduct as well as a standard by which adjudicating agencies can ascertain compliance; (3) the words used should be well known enough to enable affected persons to understand and correctly apply them; they must be either of long standing usage in the profession or industry involved or those which have be interpreted by the courts, or those which the meaning of which may be determined by knowledge and experience, or those which may be made reasonably certain by reference to common law or legislative history. (*Id.* at p. 375.)

The *Ross* case itself notes, "'[A] substantial amount of vagueness is permitted in California zoning ordinances' in order to permit delegation of broad discretionary power to administrative bodies. [Citations.]" (*Id.* at p. 376, citing *Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682.)

The Ordinance provides at section (B)(3): "3. Foliage Obstruction. No person shall significantly impair a view from a viewing area of a lot by permitting foliage to grow to a height exceeding: [¶] a. The height determined by the view restoration commission through issuance of a view restoration permit under Section 17.02.040 (C)(2) of this chapter; or [¶] b. If no view restoration permit has been issued by the view restoration commission, a height which is the lesser of. [¶] 1. The ridge line of the primary structure on the property; or [¶] ii. Sixteen feet. [¶] If foliage on the property already exceeds the provisions of subdivisions (i) and (ii) of Section 17.02.040(B)(3) of this chapter on the effective date of this section, as approved by the voters on November 7, 1989, and significantly impairs a view from a viewing area of a lot, then notwithstanding whether any person has sought or obtained issuance of a view restoration permit, the foliage owner shall not let the foliage exceed the foliage height existing on the effective date of this section (November 17, 1989). *The purpose of this paragraph is to ensure that owners of foliage which violates the provisions of this paragraph on the effective date of this section shall not allow the foliage to increase in height. This paragraph does not 'grandfather' or otherwise permit such foliage to continue to block a view.*"[2] (Italics added.)

---

[2] The last two sentences were not contained in the original Proposition M. The first of these sentences was added when Proposition M was codified, the last one added when the ordinance was amended in 1997.

Appellant contends that the final paragraph of this section is so deceptive and uncertain as to violate due process principles, as demonstrated by the minutes of the City Council meeting held on July 1, 1997. In particular, appellant argues that it is unclear whether paragraph (3)(b) applies when no VRC determination has been made or to all foliage in existence at the time of enactment.

Section (3)(B) can be fairly read without resort to other materials as follows: If a property owner had trees exceeding 16 feet prior to November 17, 1989, impairing the view of a neighbor, the property owner is prohibited from letting that foliage grow any higher whether or not the neighbor has obtained a view restoration permit. The final sentence means that if the neighbor does eventually seek a permit, the trees in excess of 16 feet can be ordered to be trimmed. We do not find this section to be either deceptive, unclear or uncertain.

Appellant also contends that section (C)(2)(f) of the Ordinance, which permits the VRC to recommend removal and replacement of trees is vague and confusing because there is no language indicating the consequences that befall a non-consenting foliage owner. That section provides: "The view restoration commission may impose such reasonable conditions or restrictions on the approval of a view restoration permit as may be found to be appropriate or necessary to protect the

public health, safety or welfare or the foliage owner's reasonable enjoyment of his or her property. Such conditions or restrictions may include, but are not limited to: (1) requiring the complete removal of the subject foliage when the commission finds that the trimming, culling, lacing or reducing of that foliage to sixteen feet or the ridge line is likely to kill the foliage, threaten the public health, safety and welfare, or will destroy the aesthetic value of the foliage that is to be pruned or reduced in height, provided that the property owner consents to the removal; and (2) requiring replacement of such foliage when the commission finds that removal without replacement will cause a significant adverse impact on: (a) the public health, safety, and welfare, (b) the privacy of the property owner, . . . provided that the property owner consents to the replacement."

We find no vagueness in this section either. The VRC is empowered to impose whatever reasonable conditions or restrictions as are appropriate or necessary "as may be found to be appropriate or necessary to protect the public health, safety, or welfare" in the event that a property owner does not consent to removal or replacement. There is nothing unconstitutional about this delegation of broad discretionary power to the VRC and the City. (*Ross, supra,* 192 Cal.App.3d at p. 376.)

DISPOSITION

The judgment of the superior court is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.

APPENDIX B

Court of Appeal, Second Appellate District,
Division Four - No. B138366
S095170

SUPREME COURT
F I L E D
March 21 2001

Frederick K. Ohlrich Clerk

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JON ECHEVARRIETA,
Plaintiff and Appellant,
v.
CITY OF PALOS VERDES, et al.,
Defendants and Respondents.

Petition for review DENIED.
Kennard, J., did not participate.

GEORGE

Chief Justice

APPENDIX C

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

COURT OF APPEAL-SECOND DIST.
FILED
JAN 18 2001
Joseph A. Lane Clerk
B. Pantoja Deputy Clerk

JON ECHEVARRIETA,
Plaintiff and Appellant,
v.
CITY OF LOS ANGELES, et al.,
Defendant and Respondent.

B138366
(Super. Ct. No. YS006446)
(Jean E. Matusinka, Judge)

ORDER CERTIFYING OPINION
FOR PUBLICATION

THE COURT:*

Good cause appearing, it is ordered that the opinion in the above entitled matter, filed January 3, 2001, be published in the official reports.

/S/	/S/	/S/
*VOGEL (C.S.), P.J.	EPSTEIN, J.	HASTINGS, J.

APPENDIX D

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

COURT OF APPEAL-SECOND DIST.
FILED
JAN 30 2001
Joseph A. Lane Clerk
J. Guzman Deputy Clerk

JON ECHEVARRIETA
Plaintiff and Appellant,
v.
THE CITY OF RANCHO PALOS VERDES, et al.,
Defendants and Respondents.

B138366
(Super. Ct. No. YS006446)

ORDER DENYING PETITION
FOR REHEARING AND MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

THE COURT:*

The petition for rehearing is denied. It is ordered that the opinion filed January 3, 2001, and certified for publication on January 18,

2001, be modified as follows:

1. On page 2, the first sentence of the third paragraph is modified to read as follows: "In pertinent part, the Ordinance prohibits residents of the City from significantly impairing a view by permitting foliage to grow in excess of certain height limitations."

2. On page 6, in the first sentence of the first paragraph, the words "addresses five issues" shall be deleted and the words "makes the following contentions" shall be inserted in their place.

3. On page 6, in the third sentence of the second paragraph, the word "on" shall be inserted before the word "property."

4. On page 11, the last sentence in the first paragraph is omitted.

5. On page 12, in the first full sentence, beginning with "In support" the word "argument" shall be omitted and the word "arguments' inserted in its place.

There is no change in judgment.

/S/	/S/	/S/
*VOGEL (C.S.), P.J.	EPSTEIN, J.	HASTING, J.

APPENDIX E

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION 4

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012

Jon Echevarrieta
vs.
City of Rancho Palos Verdes
B138366
Los Angeles County No. YS006446

*** **REMITTITUR** ***

I, Joseph A. Lane, Clerk of the Court of Appeal of the State of California, for the Second Appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled cause on January 3, 2001 and that this order, opinion or decision has now become final.

Respondents to recover costs on appeal.

Witness my hand and the seal
of the Court affixed at my
office this

April 23 2001
Joseph A. Lane, Clerk

by:_____
Deputy Clerk

cc: All Counsel
File

APPENDIX F

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 11/19/99 DEPT. SW B
HONORABLE JEAN E. MATSINKA, JUDGE
HONORABLE JUDGE PRO TEM
NONE DEPUTY SHERIFF
D. LUNA DEPUTY CLERK
ELECTRONIC RECORDING MONITOR
NONE REPORTER

9:00 am YS006446 Plaintiff N/P
Counsel

JON ECHEVARRIETA
VS
CITY OF RANCHO PALOS VERDES, ET AL.
Defendant
Counsel N/P

NATURE OF PROCEEDINGS:

ORDER ON SUBMITTED MATTER

In the cause heretofore submitted on 10-12-99 the court now rules as follows:

The court has read and reviewed the briefs submitted by the parties; Volumes 1 and 2 of the certified administrative record and numerous cases and statutes. The plaintiff's petition for writ of mandate and declaratory relief are denied.

The view restoration ordinance is a valid exercise of the city's police power and is not preempted by state law.

In light of the whole record, there is substantial evidence which supports the findings contained in Resolution 98-21 and the findings supported the City Council's decision.

Uncontradicted evidence in the record show that the plaintiff had reasonable notice of the City Council's public hearings regarding his property and was given reasonable opportunity to be heard. Plaintiff's due process rights were not violated.

Kucera v Lizza; 59 CA 4th 1141 (97).

MINUTES ENTERED
11/19/99
COUNTY CLERK

APPENDIX G

RESOLUTION NO. 98-21

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES AFFIRMING THE APPROVAL OF VIEW RESTORATION PERMIT NO. 29 TO TOP, TRIM, AND/OR REMOVE TREES AT 30327 GANADO DRIVE.

WHEREAS, on February 18, 1997, Mr. and Mrs. Norbert Keilbach, who own property located at 3632 Greve Drive, in the City of Rancho Palos Verdes, filed an application for View Restoration Permit No. 29 ("Permit") to top, trim and/or remove several trees on the property located at 30327 Ganado Drive. ("the subject property"), owned by Mr. Jon Echevarrieta ("the foliage owner"); and

WHEREAS, pursuant to the requirements of the Municipal Code, notice of the hearing before the View Restoration Commission ("Commission"), along with copies of the Staff report, were mailed to the applicant and the foliage owner on April 1, 1997, 30 days in advance of the hearing; and

WHEREAS, on May 1, 1997, after all voting members of the View Restoration Commission had visited the site, the Commission held a duly noticed public hearing, to consider the request, at which time, all interested parties were given an opportunity to

be heard and present evidence, the View Restoration Commission made all necessary findings, and approved View Restoration Permit No. 29 by adopting V.R.C. Resolution No. 97-5; and

WHEREAS, on May 16, 1997, within the fifteen day appeal period, Mr. Jon Echevarrieta, the foliage owner, appealed the Commission's decision to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Municipal Code, the City Council held a public hearing on July 1, 1997, at which time all interested parties were given an opportunity to be heard and present evidence on the notice of appeal; and

WHEREAS, after hearing all public testimony, and discussing the issues, the City Council remanded VRP No. 29 back to the View Restoration Commission: and

WHEREAS, on October 2, 1997, after all voting members of the View Restoration Commission had revisited the site, the Commission held a duly noticed public hearing to consider the request, at which time, all interested parties were given an opportunity to be heard and present evidence, the View Restoration Commission made all necessary findings, and approved View Restoration Permit

No. 29; and

WHEREAS, on November 6, 1997, the View Restoration Commission adopted V. R. C. Resolution No. 97-21 as amended in the attached conditions outlined in Exhibit A; and

WHEREAS, on November 21, 1997, within the fifteen day appeal period, Mr. Jon Echevarrieta, the foliage owner, appealed the Commission's decision to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Municipal Code, the City Council held a public hearing on March 17, 1998, at which time all interested parties were given an opportunity to be heard and present evidence on the notice of appeal; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DOES FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: The applicant at 3632 Greve Drive has a view, as defined by Section 17.02.040 of the City's Development Code, which includes the Pacific Ocean and Catalina Island.

Section 2: The applicant's viewing area, as defined by Section 17.02.040 of the City's

Development Code, includes: the living room, dining room, and an outdoor patio area at the rear of the property at 3632 Greve Drive because these areas all share the same view of the ocean and Catalina Island.

Section 3: The subject property at 30327 Ganado Drive contains four (4) large Pine trees, one (1) Ash tree, one (1) Ornamental Plum tree, one (1) Olive tree, one (1) Scrub Oak tree, that significantly impair the applicant's view.

Section 4: The applicant has complied with the early neighbor consultation process and has shown proof of cooperation on their part to resolve conflicts, as evidenced by the letter dated February 13, 1997 and receipt for registered mail sent to the foliage owner at 30327 Ganado Drive.

Section 5: Based on evidence provided by the applicant, the subject trees at 30327 Ganado Drive significantly impair a substantial portion of the applicant's primary view. Two (2) Pine trees measure approximately 35 to 40 feet, one (1) Pine tree measures approximately 60 feet, one (1) Pine tree measures 18-20 feet, the Ash tree measures approximately 35-40 feet, the Olive tree measures roughly 40-50 feet, the Ornamental Plum tree measures 20 feet, and the Scrub Oak tree measures roughly 40 to 50 feet tall. All trees exceed the ridge line of the primary

structure of the foliage owner's property, which is approximately 26 feet in height as measured from the existing building pad grade. The ridgeline of the primary structure is located at a higher elevation than the 16 foot elevation measured from the existing base of each tree.

Section 6: The subject property is located less than one thousand (1,000) feet from the applicants property.

Section 7: The applicant's and foliage owner's properties were created in 1963. There is a solis report in the file demonstrating that the area was covered with brush and that the subject trees did not exist prior to the establishment of the lots.

Section 8: The recommended topping, trimming, and/or removal of the subject trees will not cause an increased or unreasonable infringement on the privacy of the foliage owner since the subject trees limit but do not totally eliminate all viewing onto the foliage owner's property from the applicant's property. Further, replacement shrubs are required to be planted at the applicant's expense to allow for additional screening.

Section 9: The foliage owner questioned the legality of the applicant's second story deck. Staff researched the issue and found that the

Planning Department had approved the Site Plan Review for the deck, however, the building plan check for the project had expired. Prior to the start of the second VRC review, the applicant resolved the matter with the City's Building and Safety Department and a final building permit was issued.

Section 10: Based on the field review of the City's Geotechnical Consultant, the recommended removal of the subject Pine trees, without replacement of such foliage, could increase slope erosion. As a result, the City's Geotechnical Consultant has advised that: the Pine tree stumps and the root systems should remain intact and replacement shrubs shall be planted, as identified in Condition No. 2 of attached Exhibit "A", to further support the slope.

Section 11: The topping, trimming, and/or removal of the subject trees as identified in Conditions 1 through 7 of attached Exhibit "A", is necessary in order to restore the applicant's view.

Section 12: Pursuant to Section 15300 of the California Environmental Quality Act the proposed project is categorically exempt under Class 4 of that section because the work required to restore the applicants view does not include the removal of scenic and mature trees

as identified by the City of Rancho Palos Verdes General Plan (Visual Aspects; Figure 41).

Section 13: The time within which the judicial review of the decision reflected in this Resolution, if available, must be sought is governed by Section 1094.6 of the California Code of Civil Procedure.

Section 14: For the foregoing reasons and based on the information and findings included in the Staff Report, Minutes and other records of proceedings, which are attached hereto by reference, the City Council of the City of Rancho Palos Verdes hereby denies the appeal, thereby upholding the View Restoration Commission's decision with modifications to the conditions of approval attached as Exhibit A, and approves View Restoration Permit No 29 to top, trim, and/or remove trees at 30327 Ganado Drive in order to restore the view from 3632 Greve Drive, as requested and provided for in the conditions outlined in the attached Exhibit "A" and the attached plot plan diagram.

PASSED, APPROVED, AND ADOPTED on the 7th day of April 1998.

/s/ BARBARA J. FERRARO
Mayor

ATTEST:

/s/ JO PURCELL
City Clerk

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss
CITY OF RANCHO PALOS VERDES)

I, Jo Purcell. City Clerk for the City of Rancho Palos Verdes, hereby certify that the above Resolution No. 98-21 was duly and regularly passed and adopted by the said City Council at a regular meeting held on April 7, 1998.

_____
City Clerk

EXHIBIT "A*
CONDITIONS OF APPROVAL
VIEW RESTORATION PERMIT NO. 29

1. Pine Trees No. 1, 2, & 3 : Remove Pine trees No. 1, No. 2, and No. 3, with the consent of the foliage owner. However, if the foliage owner does not grant the authority to remove the trees, then the crowns of all three trees shall be topped to the level of the applicants pad and maintained in such a manner. Additionally, the applicant shall pay for the planting of a mid-slope privacy barrier. The barrier shall consist of a variety of plants (not more than 20 to 25 plants), to be selected by the foliage owner from a list provided by Staff. Final selection and placement of the plant materials shall be made by the foliage owner, reviewed by the City Arborist, and approved by the Director of Planning, Building, and Code Enforcement. The City Arborist shall provide the foliage owner with all the information that will assist the foliage owner in selecting the appropriate plantings, including but limited to, the distance of the plantings from the top of the slope, the natural mature height of the selected foliage and the anticipated frequency and costs of maintenance of the foliage.

2. To prevent increased slope erosion, the stumps and the root systems of Pine trees No. 1, 2, and 3 should remain intact and the area shall be replanted with Acacia Redolens, or a similar plant species approved by the Director of Planning, Building and Safety, and Code Enforcement. Any newly planted foliage shall be maintained at a height that will not impair a view from another property in the future.

3. Pine Tree No. 4: Pine tree No. 4 shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

4. Ash Tree: The Ash tree shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

5. Olive Tree: The Olive tree shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point

at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

6. Ornamental Plum Trees: The Ornamental Plum shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

7. Scrub Oak Tres : The Scrub Oak shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

8. Pursuant to Section V-A-4 of the VRP Guidelines and Procedures, any tree or shrub that is removed shall be cut flush to the ground leaving the root systems and stumps in place.

9. If any tree or shrub that is ordered to be culled, laced, or trimmed as specified in this permit, dies within one year of the

initial work being performed due to the performance of the work, the applicant or any subsequent owner of the applicant's property shall be responsible for providing a replacement tree or shrub to the foliage owner. The replacement foliage shall be provided in accordance with the specifications described in Section V-E of the VRP Guidelines and Procedures.

10. No sooner than one year after the initial trimming is completed, City Staff shall report to the Commission as to the adequacy of the maintenance schedule, as well as the foliage owner's ability to maintain the foliage in compliance with these conditions of approval. The Commission shall consider the Staff report and determine if a public hearing to amend the conditions is necessary. If the Commission determines that a hearing is necessary, then a hearing will be held pursuant to Section V.I. of the VRP Guidelines and Procedures.

11. The applicants should, not later than 30 days after approval of this permit, present to the City, at least one itemized estimate to carry out the aforementioned work. Such estimate is to be supplied by a licensed landscape or licensed tree service contractor, acceptable to the City, which

provides insurance certificates in a form acceptable to the City, and shall include all costs of cleanup and removal of debris. In addition, the applicant shall pay to the City an amount equal to the City selected estimate and such funds shall be maintained in a City trust account until completion of work.

12. The foliage owners shall select a contractor from the estimates provided by the applicants or another licensed firm of their choice subject to approval by the City, to perform the required work. However, the foliage owner shall only be reimbursed for the amount of the lowest bid submitted by the applicant. if the foliage owner chooses to do the required work himself, then the foliage owner shall not be compensated from the trust account and the amount in the trust account shall be refunded to the applicant.

13. The applicant may reduce the scope of the trimming required by this Permit by giving the City and the foliage owner written notice of such decision within 30 days of this approval. The applicant shall deposit funds to the City in a trust account in an amount sufficient to cover the remaining work. However, trimming or removal of the

vegetation which the applicants have chosen to eliminate would then require an entirely new View Restoration application and fee.

14. The applicant may withdraw his view restoration request and his trust account funds if the applicant does so within five (5) days after the applicant has sent the estimate required herein. In the event that the applicant withdraws his/her request in a timely manner, the foliage owner is not required to perform the work specified by this Permit and this Permit is of no further force and effect.

15. The foliage owner shall, no later than 90 days after the Notice of Approval (First Notice) is mailed, complete the work to the extent required by this Permit, and shall maintain the vegetation to a height that will not impair a view from another property in the future as specified in these Conditions of Approval.

16. The City shall reimburse the foliage owner from the City's trust account, not later than 30 days after receipt of the appropriate billing and the satisfactory completion of the required work specified by this Permit, as verified by City Staff, in an amount not to exceed the amount of

the applicant's trust account.

17. If the required work as specified herein is not completed within the stipulated time periods, then the City of Rancho Palos Verdes will authorize a bonded tree service to perform the foliage removal work at the subject property at the foliage owner's expense. In the event that the City is required to perform the work at the foliage owner's expense, the City shall reimburse the applicant from the City trust account not later than 30 days after the City completes the work.

18. Subsequent to the trimming or removal of the foliage, Staff will document the restored view for future reference by submitting to the applicant, foliage owner, and Director of Planning, Building and Code Enforcement, photographs of the restored view taken from the applicant's viewing area along with a "Documentation of Existing Foliage or View"

APPENDIX H

CITY OF RANCHO PALOS VERDES ORDINANCE

17.02.040 View preservation and restoration.

The residents of the city or Rancho Palos Verdes, by the adoption of this section, have made a finding that the peace, health, safety and welfare of the community will be served by the adoption of this section and by the regulations prescribed herein.

* * * * *

2. Restoration of Views Where Foliage is a Factor.

a. Any resident owning a residential structure with a view may file an application with the city for a view restoration permit. The applicant shall file with the application proof that the applicant consulted, or attempted to consult, with the property owner whose foliage is in question. The applicant shall pay a fee for the view restoration permit as established by resolution of the city council.

b. The application shall be submitted to the view restoration commission. Written notice of the time and place for the hearing on the application shall be sent to the applicant and the property owner(s) of the foliage involved at least thirty calendar days prior to the meeting of the commission. Commission members shall inspect the site prior to the public hearing. Only view

restoration commission members who make a site inspection may participate in the public hearing.

c. In order for a view restoration notice to be issued, the commission must find:

i . The applicant has complied with the early neighbor consultation process and has shown proof of cooperation on his/her part to resolve conflicts;

ii. Foliage exceeding sixteen feet or the ridge line of the primary structure, whichever is lower, significantly impairs a view from the applicant's viewing area, whether such foliage is located totally on one property, or when combined with foliage located on more than one property;

iii. The foliage to be removed is located on property, any part of which is less than one thousand feet from the applicant's property line(s);

iv. The foliage significantly impairing the view did not exist, as view impairing vegetation, when the lot from which the view is taken was created;

v. Removal or trimming of the foliage will not cause an unreasonable infringement of the privacy of the occupants of the property upon which the foliage is located;

vi. For property located within the boundaries of the Miraleste recreation and park district, the commission shall also find the removal or trimming of the foliage strikes a reasonable balance between meeting the purposes of Section 17.02.040 of this chapter, as set forth in

the ordinance approved by the voters on November 7, 1989, and preserving the historical developments of the Miraleste recreation and park district area with a large number of trees.

d. Should the commission make findings requiring issuance of a view restoration permit, the director shall send a notice to the property owner to trim, cull, lace or otherwise cause the foliage to be reduced to sixteen feet or the ridge line of the primary structure, whichever is lower, or such limit above that height which will restore the view. The property owner will have ninety calendar days to have the foliage removed. The applicant shall be responsible for the expense of the foliage removal and/or replacement ordered pursuant to this subsection only to the extent of the lowest bid amount provided by contractors licensed to do such work in the city of Rancho Palos Verdes and selected by the applicant. If after ninety calendar days the foliage has not been removed, the city of Rancho Palos Verdes will authorize a bonded tree service to trim, cull, lace or remove the identified foliage at the owner's expense. After the initial trimming, culling, lacing or removal of the foliage, the owner, at the owner's expense, shall be responsible for maintaining the foliage so that the view restoration required by the view restoration permit is maintained.

e. To the extent legally permissible, trees or foliage on property owned by any governmental entity, except the city and the Miraleste

recreation and park district, shall be subject to view restoration control, as per the provisions of this section; except, that the foliage shall be trimmed or removed thirty calendar days following issuance of the notice. Trees and/or foliage located on city property, or in the public right-of-way, as defined in Chapter 17.96 (Definitions), shall be subject to view restoration control, as per the provisions of this section, pursuant to the city tree review permit procedure contained in Section 17.76. 100 (City tree review permit.)

f. The view restoration commission may impose such reasonable conditions or restrictions on the approval of a view restoration permit as may be found to be appropriate or necessary to protect the public health, safety or welfare or the foliage owner's reasonable enjoyment of his or her property. Such conditions or restrictions may include, but are not limited to: (1) requiring the complete removal of the subject foliage when the commission finds that the trimming, culling, lacing or reducing of that foliage to sixteen feet or the ridge line is likely to kill the foliage, threaten the public health, safety and welfare, or will destroy the aesthetic value of the foliage that is to be pruned or reduced in height, provided that the property owner consents to the removal; and (2) requiring replacement of such foliage when the commission finds that removal without replacement will cause a significant adverse

impact on, (a) the public health, safety and welfare, (b) the privacy of the property owner, (c) shade provided to the dwelling or the property; (d) the energy-efficiency of the dwelling; (e) the health or viability of the remaining landscaping, or (f) the integrity of the landscape plan, provided that the property owner consents to the replacement.

*****

Supreme Court, U.S.
FILED
AUG ~~ 2001
OFFICE OF THE CLERK

No. 01-0002

In The

Supreme Court of the United States

JOHN ECHEVARRIETA,

Petitioner,

vs.

THE CITY OF RANCHO PALOS VERDES, a Municipal Corporation; THE CITY OF RANCHO PALOS VERDES CITY COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District Division Four

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GREGORY M. KUNERT, *Counsel of Record*
RICHARDS, WATSON & GERSHON,
A PROFESSIONAL CORPORATION
333 South Hope Street, 38th Floor
Los Angeles, California 90071
(213) 626-8484
Attorneys for Respondents City of Rancho Palos Verdes and Rancho Palos Verdes City Council

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Should certiorari be granted to determine whether a compensable taking results from a local land use regulation that limits the height at which foliage may be maintained, that does not single out one landowner but applies generally to all property in the city, where the regulation

- does not impose a liability retroactively but merely regulates the height of existing, present and future landscaping; and
- has minuscule or no impact on the value of Petitioner's property and does not affect Petitioner's primary, "essential use" of his valuable residential property?

THE PARTIES

Petitioner John Echevarrieta is the Petitioner herein, was the Petitioner and Appellant below and is a residential property owner in the City of Rancho Palos Verdes, California. Respondent City of Rancho Palos Verdes is a municipal corporation organized and existing under and by virtue of the general laws of the State of California. The City of Rancho Palos Verdes City Council is not an independent legal entity, but is by law the legislative body of the City of Rancho Palos Verdes, the members of which are duly elected by the registered voters in the City of Rancho Palos Verdes.

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OPINIONS BELOW

The Opinion of the California Court of Appeal, Second Appellate District, Division Four, as modified, is cited as 86 Cal.App.4th 472, 103 Cal.Rptr.2d 165 (2001) and is included here as Appendix 1. The California Supreme Court denied review on March 21, 2001. The City of Rancho Palos Verdes City Council's resolution (Resolution No. 98-21) affecting Petitioner's property is included here as Appendix 2.

STATEMENT OF THE CASE

Petitioner's Statement of the Case portrays facts inaccurately and asserts as fact suppositions that are both absent from the record before the state courts and false. In so doing, Petitioner invites this Honorable Court to disregard the factual determinations of the California courts and sit as a trier of fact *de novo*. After reviewing a voluminous Administrative Record of proceedings before the City's View Restoration Commission and the City Council, the California Court of Appeal determined the salient facts.

The subject view protection ordinance ("Ordinance") was adopted by voter initiative in 1989. The Ordinance prohibits property owners from allowing and maintaining foliage growth that "significantly impairs" a "view," as carefully defined by the Ordinance.

Petitioner claims that residents were encouraged to plant tall trees when homes were constructed in the

1960s. Petition, p. 4. Although that assertion is of questionable significance to the present petition, this Honorable Court should be informed that the record before the California courts contains no support for that assertion. Moreover, whatever "encouragement" Petitioner may have imagined in 1964, the City did not "reverse its position" (Petition, p. 4) by adopting the Ordinance as Petitioner claims. In fact, the City did not exist in the 1960s and was not incorporated until 1973. *See, Curtis v. Board of Supervisors*, 7 Cal.3d 942 (1972) (California Supreme Court held state law governing municipal incorporation was unconstitutional, thus allowing organizers of the "proposed City of Rancho Palos Verdes" to proceed with incorporation).

Apart from Petitioner's various factual misrepresentations, the Court of Appeal's Opinion summarizes the pertinent facts. Under the Ordinance, a property owner adversely affected by a significant view impairment may apply for a view restoration permit, after attempting informal consultation and resolution with the foliage owner. The Ordinance establishes the View Restoration Commission to conduct public hearings on view restoration permits, take evidence and render findings in accordance with the Ordinance. The City Council hears appeals. App. 1, p. 2.

Petitioner's neighbor, Mr. Keilbach, applied for a view restoration permit regarding eight trees on Petitioner's property that blocked Mr. Keilbach's view of the Pacific Ocean and Catalina Island. Several hearings were conducted by the View Restoration Commission and the City Council, and the matter was remanded once to the View Restoration Commission to render further hearings

and findings regarding specific concerns raised by Petitioner. Ultimately, the City Council affirmed a decision of the View Restoration Commission finding that Petitioner's foliage significantly impairs Mr. Keilbach's view and requiring Petitioner to eliminate the significant view impairment by trimming or topping the obstruction. As allowed by the Ordinance, the City's decision called for the remedial work to be performed at Mr. Keilbach's expense, and for Mr. Keilbach to provide replacement foliage at his expense to serve as a privacy barrier, thus placing the economic burden of compliance with the regulation on Mr. Keilbach and mitigating any economic burden to Petitioner.

The Ordinance has an insignificant impact on Petitioner's property value. The Court of Appeal found it "even questionable" whether Petitioner's property value was diminished, and aptly observed that it may be enhanced by the City's regulation. App. 1, p. 11, 12.

Appellant filed a Petition for Writ of Administrative Mandate in the Los Angeles County Superior Court challenging the City's decision as exceeding the City's police power, preempted by state property law and constituting an unconstitutional taking of property. After considering a voluminous Administrative Record and numerous briefs and arguments, the Superior Court denied the Petition. On appeal, the Petitioner abandoned his police power and preemption arguments and contended instead that the City's action violated the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitutions and analogous provisions of the California Constitution. The unanimous panel of Division Four of the California Court of Appeal for the

Second Appellate District affirmed the judgment of the trial court. The California Supreme Court denied Petitioner's Petition for Review.

REASONS TO DENY THE WRIT

I.

THIS PETITION PRESENTS NO BONA FIDE ISSUE OF PUBLIC IMPORTANCE

Nothing in the Court of Appeal's Opinion justifies a grant of certiorari by this Honorable Court. Indeed, Petitioner's characterization of the case as "rarely litigated" (Petition, "Questions Presented" p. i) reveals the lack of general interest and importance this matter carries. Petitioner's contention that the Opinion below conflicts with existing precedent is based on Petitioner's misunderstanding and mischaracterization of this Court's holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Similarly, Petitioner's suggestion that the Court of Appeal's Opinion in this case somehow licenses local government to take and convert property for public use by physical means represents a complete distortion of the Opinion below and the record upon which it was based.

Correctly decided as the Opinion is, it does not represent a landmark decision. At most, the reach of the Opinion below may extend to view preservation ordinances governing residential foliage height in California jurisdictions that have imposed such regulations. There is no reason to suppose that this insignificant decision of an

intermediate appellate tribunal will guide the development of Takings Clause jurisprudence outside of California. There is no reason to suppose that the decision, which cites and relies on the cases of this Honorable Court and of the California Supreme Court, somehow might be applied by other California courts to upset such precedent.

Moreover, the scarcity of cases involving view protection ordinances itself reveals that jurisdictions that have adopted such regulations are few and far between. The Court of Appeal's Opinion has no significance whatsoever to anyone but the smattering of local jurisdictions involved in view preservation. Even in the State of California – which includes hundreds of local governmental legislative bodies having local jurisdiction over land use, and league upon league of scenic coastline and alpine mountain range of which many a view may be enjoyed – there are probably no more than a handful of municipalities that have proposed view protection measures. Petitioner's own assertion that the law in most jurisdictions does not recognize view protection undermines any assertion that this Petition presents any substantial or important question.

In proper perspective, the instant Petition presents no issue warranting a grant of certiorari. Stripped of Petitioner's grandiose claims of importance, the Petition does nothing more than ask the United States Supreme Court to review an intermediate appellate court for error. But the Opinion below is not erroneous.

II.

THE COURT OF APPEAL'S OPINION DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*

Petitioner's charge that the Opinion conflicts with *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) is wrong. Petitioner is the owner and occupant of a single family residence located on the subject property. That property is zoned for single family residential use. Neither the City's Ordinances nor the Court of Appeal's Opinion deprives Petitioner of that use or interferes with continuing that use. The Ordinance in question merely regulates the minor and incidental matter of foliage height.

Lucas, in contrast, presented this Court with a state statute "which had the direct effect of barring petitioner from erecting any permanent habitable structures" on his property, along with a state trial court finding that the statute "rendered Lucas's parcels 'valueless.' " *Lucas,* 505 U.S. at 1007. The Court in *Lucas* considered the question of "whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a [compensable] taking of private property. . . . " *Id.* The *Lucas* decision proceeds on the basis that the South Carolina statute effected a compensable taking of Lucas's property under this Court's "categorical treatment" of a "regulation [that] denies all economically beneficial or productive use of land." *Lucas,* 505 U.S. at 1015.

The instant case could not be further from the categorical total deprivation involved in *Lucas.* The impact of the City's view ordinance on Petitioner's single family

residential property on a coastal hillside is *de minimus*, at most. Petitioner has a valuable residence that is surrounded by a yard that has substantial landscaping unaffected by the City's Ordinance, and that he may further lushly landscape (subject only to the minor limitation that he may not obstruct his neighbor's view with foliage exceeding 16 feet in height). Petitioner is free to enjoy the value of the property as a residence, or sell it for a quite valuable consideration. Thus, *Lucas* does not aid Petitioner's cause, and the California Court of Appeal appropriately so found.

Petitioner in this case goes to great lengths to argue that view preservation is not a common law nuisance or a "background principle" of California property law as discussed by the majority opinion in *Lucas*. Petitioner's efforts miss the point, however, and are unavailing. The *Lucas* majority rejected South Carolina's argument that any valid police power objective of a regulation would serve to immunize the state's "total deprivation" from a Takings Clause challenge. In so doing, the *Lucas* majority did address issues regarding uses accepted as nuisances under state common law and the government's ability to ban such "noxious uses" without paying compensation under the authority of *Mugler v. Kansas*, 123 U.S. 623 (1887) and similar cases. 505 U.S. at 1022. But the *Lucas* Court did so only in the context of the categorical, total deprivation imposed on Mr. Lucas. This Court held that a total proscription of all economically valuable use is not free from an obligation to pay compensation for the categorical taking merely because the goal of the regulation is a valid police power objective. However, the *Lucas* majority opined, a regulation seeking to eliminate a condition

or use traditionally recognized as a nuisance, and therefore constituting an inherent limitation on the owners' title, would not require a payment of just compensation, even if the regulation eliminated the property owner's only economically beneficial use:

> "We believe similar treatment must be accorded ***confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land:*** Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." (emphasis added).

505 U.S. at 1029.

Petitioner misreads *Lucas* as requiring compensation for any restriction, no matter how slight, on a use that is not understood to be a nuisance under the common law of the State. To the contrary, the *Lucas* opinion recognizes the ability to regulate and restrict existing uses without paying compensation, so long as some economically beneficial use is preserved:

> "It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; . . . And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless . . . In the case of land, however, we think the notion pressed by the Council that title is somehow

> held subject to the 'implied limitation' that the State may subsequently eliminate ***all economically valuable use*** is inconsistent with the historical compact recorded in the Takings Clause. . . . "

505 U.S. at 1027-1028 (emphasis added).

Thus, this case is not affected by the *Lucas* discussion of historical common law property law and nuisances. The Ordinance in this case obviously is not "confiscatory" within the meaning employed by the *Lucas* court ("regulations that prohibit all economically beneficial use of land"). The Ordinance is within the City's police power, and nothing in the *Lucas* decision or the instant Petition calls that into question. Likewise, nothing in the *Lucas* decision suggests that the use restriction involved in this case requires compensation.

Petitioner seeks to avoid both controlling legal precedent and the unassailable facts that his residential use is not impaired and his property value is undiminished by protesting that he is only seeking compensation for a taking of his trees. That contention is an act of smoke and mirrors that did not fool the California Court of Appeal. The City's regulations do not seek to take Petitioner's trees for some public use or prohibit Petitioner from owning and making use of the trees. The regulations merely prohibit Petitioner from maintaining his trees at their current view-impairing height and location.

The Court of Appeal correctly viewed Petitioner's trees as an incident of his real property ownership. If Petitioner is to be believed, the trees cannot be trimmed or relocated. That could only be true if the trees have

been so affixed to the real property at their present location that they cannot be regarded separately. Moreover, Petitioner's disingenuous claim that he asserts only a taking of his trees, apart from his real property interest, supposes that he could sell his real property interest and retain his ownership of his trees. That patently erroneous supposition opens a trap door beneath Petitioner's claim that the trees must remain at their present height at their present location unless just compensation is paid. In addition, Petitioner's self-deflating argument flies in the face of the language of the *Lucas* majority, quoted above, that states have even broader authority to regulate and restrict use of personal property without implicating the Takings Clause.

Neither Petitioner nor any other property owner is entitled to be free from any restriction on each and every single manner in which he has ever enjoyed the use of his property, and the Takings Clause does not require payment of compensation any time a property use is regulated in a manner that restricts a way in which an owner previously enjoyed his use. The Court of Appeal's Opinion is entirely consistent with the *Lucas* holding.

III.

THE COURT OF APPEAL'S OPINION DOES NOT CONFLICT WITH *EASTERN ENTERPRISES v. APFEL*

Petitioner's contention that the Court of Appeal's decision conflicts with *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) also misses the mark. *Eastern Enterprises* considered a purely economic congressional enactment,

not a local zoning regulation. The Coal Act and its implementation reviewed by this Honorable Court in *Eastern Enterprises* imposed a liability of tens of millions of dollars on Eastern based on Eastern's involvement in the coal mining industry and employment of miners decades ago, even though Eastern had discontinued its coal mining business years before the Coal Act was passed. There is no valid analogy between the retroactive imposition of an enormous financial liability based on Eastern's ancient activities in an enterprise in which Eastern was no longer engaged and the facts of the present case.

Petitioner cavalierly claims that the City's Ordinance applies retroactively like the Coal Act in *Eastern*, but that is simply not true. The Ordinance does not impose an enormous retroactive liability for Petitioner's ancient commercial activities in which he is no longer engaged. The Ordinance merely regulates his *present* and *future* property use. Indeed, unlike the Coal Act in *Eastern Enterprises*, the City's Ordinance does not impose any financial liability on Petitioner. The Ordinance requires Petitioner's neighbor to advance the cost of tree trimming and other costs, as the California Court of Appeal observed.

Likewise, the Ordinance does not retroactively criminalize, penalize or exact financial remuneration for, conduct that occurred years ago. The Ordinance imposes no penalty or liability whatsoever for growing or maintaining foliage at any height prior to adoption of the Ordinance. The Ordinance merely requires Petitioner (and all City property owners) to comply with its restrictions henceforward.

Also unlike the circumstances involved in *Eastern Enterprises*, the City's Ordinance does not impose any obligations of any kind on persons who formerly owned property in the City but who have sold it, regardless of the condition of the foliage on the property before, during or after such prior ownership. The Ordinance regulates only the current use of property by current owners.

Also unlike the Coal Act under review in *Eastern Enterprises*, the City's Ordinance does not compel a Petitioner to transfer money or assets to the ownership and possession of a third party.

Petitioner ignores the huge distinctions between *Eastern Enterprises* and this case. Instead, Petitioner urges that the Court of Appeal was required to engage in a rote application of the *Eastern Enterprises* analysis notwithstanding the prevalence of more germane precedent from this Honorable Court on regulatory takings in the zoning and land use context.

Even so, the Court of Appeal did answer each of the questions that Petitioner now contends remains unanswered – the answers just were not and are not what Petitioner wants to hear. Contrary to Petitioner's contention, the Court of Appeal did answer the question of the economic impact of the City's regulation on Petitioner. The Court of Appeal found that the impact was little or nothing. App. 1, p. 11, 12. The Court of Appeal's conclusion was proper and consistent with the *Lucas* Court's categorical formulation calling for compensation when there is a total deprivation of all economical use "of land" (*see, e.g.*, 505 U.S. at 1015 and 1029). The Court of Appeal's conclusion was also in accord with the *Lucas*

Court's recognition that landowners can reasonably and "necessarily" expect new land use regulations and restrictions on use, even if the precise regulation is not anticipated, and the Court's recognition of an even broader governmental authority to regulate and restrict personal property (505 U.S. at 1027, 1028). The conclusion is not inconsistent with anything in the factually inapposite *Eastern Enterprises* decision.

The Court of Appeal did consider Petitioner's reasonable investment-backed expectations, and concluded that Petitioner had no reasonable expectation of continuing to maintain trees at a particular height in a particular location without restriction for all time. App. 1, p. 12. This, too, was in accordance with the *Lucas* Court's analysis and holding that landowners necessarily expect new regulations, and was not inconsistent with the inapposite *Eastern Enterprises* decision.

The Court of Appeal did consider whether and how far the City's Ordinance reaches into the past to assign liability, and concluded that the Ordinance regulates present and future property use and does not impose liability. App. 1, p. 11, 12. The Court of Appeal did consider the magnitude of the liability imposed, and properly concluded that the liability is virtually nil, since Petitioner's neighbor, not Petitioner, must in the first instance bear the cost of compliance. App. 1, p. 11, 12. The Court of Appeal did consider the nature of the governmental action, and properly concluded that there is nothing so unusual in the City's Ordinance as to render it unconstitutional or subject to payment of compensation. App. 1, p. 8, 10-12.

Unlike the blind-side roundhouse punch the Coal Act threw at Eastern, which had left coal mining years prior to the Coal Act and had reasonably considered itself free of the industry's entanglements, Petitioner here says he has been a City resident and property owner since the City's incorporation. As a property owner, he has had to continually maintain his property and comply with City regulations, many of them newly adopted for the first time upon the City's incorporation. As the *Lucas* opinion teaches, such is to be expected. Petitioner knew his obligations as a resident and property owner were ongoing and subject to change, and could not have ever reasonably expected to be free from any restriction just because it was new.

The extreme facts of *Eastern Enterprises* are so palpably different from the present case as to render Petitioner's reliance on *Eastern Enterprises* unwarranted. Nevertheless, the Court of Appeal Opinion considers the pertinent factors for analysis of this regulatory takings case and reaches appropriate conclusions. This Honorable Court need not entertain Petitioner's suggestion that certiorari should be granted for the purpose of reviewing this rare and insignificant case merely for possible legal error based on inapposite precedent.

IV.

THE COURT OF APPEAL OPINION IS CONSISTENT WITH THE LAW OF NON-CONFORMING USES

Finally, Petitioner makes a weak attempt to portray the Court of Appeal's Opinion as contrary to established legal precedents governing legal non-conforming uses. In

support of this contention, curiously, Petitioner cites only a few lower court decisions of the federal courts (none of which were binding precedent before the California courts). Instead of federal precedent to support his contention that the Opinion below creates a conflict in the authorities, ***Petitioner relies primarily on other published decisions of the California courts.*** In other words, Petitioner would have this Honorable Court sit as the arbiter of what Petitioner imagines are conflicts among the courts of the State of California. Is that not a more appropriate function for the California Supreme Court?

Apart from that fundamental problem, Petitioner's claim that the City's Ordinance is contrary to the weight of established "non-conforming use" precedent is wrong. The non-conforming use cases cited by Petitioner, and all of the cases of which the City is aware, involve changes in zoning regulations that serve to render illegal an existing, legal, primary economically beneficial use of land. *Edmonds v. County of Los Angeles*, 40 Cal.2d 642 (1953) (in rejecting plaintiff's claim of right to expand non-conforming use of property as a trailer court that had been legally established pursuant to government permits, California Supreme Court recognizes that legally established non-conforming commercial use may not be declared illegal, so long as it is not expanded); *Hansen Brothers Enterprises, Inc. v. Board of Supervisors*, 12 Cal.4th 533, 551 (1996) (California Supreme Court applies "diminishing asset" doctrine to a legal-nonconforming quarry, recognizing that a zoning ordinance that is not arbitrary and not unduly restrictive does not violate the Takings Clause "even when the law restricts an existing use of the affected property."); *Browning-Ferris Industries v. City of*

Maryland Heights, 747 F.Supp. 1340 (E.D. Mo. 1990) (change in zoning following city's incorporation that rendered plaintiff's landfill non-conforming where plaintiff had legally operated the landfill pursuant to government permits for years prior to the change in law); *Metromedia, Inc. v City of San Diego*, 26 Cal.3d 848 (1980) (considering reasonableness of amortization period for legal non-conforming commercial billboards); *E.B. Elliott Advertising v. Dade County*, 425 F.2d 1141 (5th Cir. 1970) (considering reasonableness of amortization of commercial billboards); *Outdoor Graphics v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996) (amortization of commercial billboards).

If the government seeks to close or drive out an undesireable business by a change in zoning laws, it must either pay just compensation pursuant to the Takings Clause or provide a reasonable period of time for the business owner to amortize and recoup his investment in the property. Each of the cases cited by Petitioner involves such facts.

No court has held that property owners are constitutionally entitled to amortization of each and every manner in which they might lawfully exercise their primary legal use. The non-conforming use doctrine requires payment of compensation or amortization before a change in zoning can close a previously legal junk yard that becomes non-conforming. The non-conforming use doctrine does not require compensation or amortization for the imposition of restrictions that do not arise to the level of a taking. Amortization is not required to impose limits on the junk yard's hours of operation, noise, or other restraints. Even as to matters of pure aesthetics, the non-

conforming use doctrine would not require just compensation or amortization before a city could impose a limitation on the *height* to which a junk yard could pile its junk, even if the junk yard had legally piled its junk higher for years.

The non-conforming use doctrine has no applicability in this case to the City's minimal restriction on Petitioner's property use, which does not render Petitioner's residence non-conforming and allows Petitioner to continue his valuable primary residential use. Indeed, the *Lucas* Court's recognition of property owners' reasonable expectation that new regulations and restrictions may be imposed without payment of compensation comports with the non-conforming use doctrine and recognizes that the doctrine does not apply in this case. 505 U.S. at 1027-1028. The California Supreme Court's recognition in *Hansen Brothers* that new regulations that are neither arbitrary nor unduly restrictive may be imposed on existing uses without payment of compensation (12 Cal.4th at 551) presents no conflict with non-conforming use doctrine or this Honorable Court's holding in *Lucas*.

Moreover, were this Court to indulge Petitioner's inapplicable non-conforming use argument, the doctrine would require the Court to engage in a detailed and messy scrutiny of historical facts to determine the precise nature of the claimed use, the precise date of commencement of the use, the state of the governing law at that time and the reasonable expectations of landowners at that time. It would further require the Court to study the changes in the governing local law over time, and how such changes might have impacted the property owner's

reasonable expectations. It would further require the Court to sit as trier of fact as to the precise nature, extent and scope of the use at the time the City's Ordinance was adopted in 1989, and determine factually whether the scope of the use (*i.e.*, in this case, the size, height and density of Petitioner's foliage) has been expanded (*i.e.*, whether the foliage has continued to grow) since that time.

There is no need for this Honorable Court to engage in such inquiries, however. The non-conforming use doctrine simply does not apply to the circumstances of this case. No non-conforming use case has imposed the doctrine where the existing use was not being conducted pursuant to an existing governmental permit authorizing that use.

CONCLUSION

This case does not present any issues of such general importance as to warrant a grant of certiorari. The Court of Appeal's Opinion has at most a limited applicability to the few California jurisdictions that protect views. The Petition fails to demonstrate any conflict between the Court of Appeal's Opinion and other precedent, and the Opinion is in fact consistent with controlling precedent

and was correctly decided. The Petition for Certiorari should be denied.

DATED: August 28, 2001

Respectfully submitted,

GREGORY M. KUNERT
Counsel of Record

for RICHARDS, WATSON & GERSHON,
A PROFESSIONAL CORPORATION
Attorneys for Respondents

APPENDIX 1

California Court of Appeal
Second Appellate District, Division 4

86 Cal.App.4th 472; ___ Cal.Rptr.2d ___ [Jan. 2001]

[No. B138366 Second Dist., Div. Four. Jan. 3, 2001.]

[As modified Jan. 30, 2001.]

JON ECHEVARRIETA, Plaintiff and Appellant, v. CITY OF RANCHO PALOS VERDES et al., Defendants Respondents.

COUNSEL

Sullivan, Workman & Dee and Robert Hampton Rogers for Plaintiff and Appellant.

Carol W. Lynch, City Attorney; Richards, Watson & Gershon, T. Peter Pierce and Gregory M. Kunert for Defendants and Respondents.

OPINION

HASTING, J. – Jon Echevarrieta (appellant) appeals from a judgment entered in favor of respondents the City of Rancho Palos Verdes (the City) and the City of Rancho Palos Verdes City Council (the City Council) after the trial court denied appellant's petition for writ of mandate. At issue is a "view protection" ordinance of the City. We affirm the trial court's judgment.

Factual and Procedural Background

The Ordinance

Voters in the City approved Proposition M on November 7, 1989. It was codified in section 17.02.040 of the Rancho Palos Verdes Municipal Code (hereinafter referred to as the Ordinance), and was most recently amended in January 1997.

In pertinent part, the Ordinance prohibits residents of the City from significantly impairing a view by permitting foliage to grow in excess of certain height limitations. If foliage in existence already exceeds those height limitations, the person whose view is impaired must first attempt to informally resolve the matter with the person who owns the foliage, and if that fails, may apply for a "view restoration permit." Hearings on the application for the permit are conducted by a view restoration Commission (VRC), a committee of seven members appointed by the City Council. The VRC may grant the permit only if certain specified findings are made. If the VRC orders any foliage trimmed or removed, or replacement foliage is ordered planted, the costs are to be borne by the permit applicant. Any interested party may appeal the VRC's decision to the City Council.

The Application Process

Since 1966, Norbert Keilbach has lived on Greve Drive in the City. His home faces south towards the Pacific Ocean and Catalina Island. Appellant lives on Ganado Drive, on a slope directly below Keilbach's home. Appellant has several trees which are near the border of

his property and Keilbach's, which purportedly block Keilbach's view of the ocean and Catalina Island.[1] Appellant purchased his property in 1964. The trees did not exist prior to the establishment of either Keilbach's or appellant's lots.

In February 1997, Keilbach filed an application with the City in order to compel appellant to trim trees that interfered with his view.

On May 1, 1997, a public hearing was held in connection with the view restoration application. Both appellant and Keilbach appeared. At the conclusion of the hearing, the VRC adopted Resolution No. 97-5, requiring that appellant remove the three pine trees, and to trim the tops of five other trees, at the expense of the applicant, Keilbach.

On May 16, 1997, appellant appealed the VRC's decision to the City Council. The City Council heard the appeal at its public meeting on July 1, 1997, and remanded the matter to the VRC for further consideration of the effect that trimming the trees would have on appellant's privacy.

The VRC held another public hearing on the application on October 2, 1997. At the conclusion of this hearing, the VRC ordered its staff to prepare for adoption at the

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[1] There are 8 trees which are the subject of the dispute: 2 pine trees which measure approximately 40 feet, 1 pine tree which measures approximately 60 feet, 1 pine tree which measures approximately 20 feet, 1 ash tree measuring approximately 40 feet, 1 olive tree which measures 40 to 50 feet, 1 ornamental plum tree which measures 20 feet and 1 scrub oak tree which measures 40 to 50 feet.

next meeting a resolution requiring appellant to trim his trees.

On November 6, 1997, the VRC approved Resolution No. 97-22. This resolution required appellant to trim eight of his trees but also required Keilbach to plant a barrier of no more than 20 to 25 low-growing shrubs between his property and appellant's to mitigate appellant's privacy concerns.

Appellant appealed this decision to the City Council. On March 17, 1998, the City Council heard the appeal during its public meeting.

On April 7, 1998, the City Council adopted Resolution No. 98-21, affirming the VRC's approval of the view restoration permit application and requiring appellant to trim eight of his trees. Appellant then filed this lawsuit in superior court.

Proceedings in Superior Court

Appellant filed his "Petition for writ of mandate; complaint for declaratory relief, taking[,] spot zoning and attorney's fees" on June 17, 1998. In his complaint, he alleged that the City and the City Council abused their discretion in affirming the decision of the VRC to issue the view restoration permit, that the City and the City Council failed to grant him a fair trial, that the affirmance of the approval of the view restoration permit constituted a taking without just compensation in violation of the Fifth Amendment, and that "[b]y its enactment of the view restoration ordinance, the City has actively engaged

in a species of illegal spot zoning," that is, the "unreasonable, arbitrary and discriminatory" classification of property by the enactment of unreasonable and arbitrary regulations pertaining to certain uses or classifications of property. He sought declaratory relief on two grounds: (1) that the ordinance is unconstitutional because it conflicts with state easement law and violates individual property rights and (2) that the view blockage cannot be declared a public nuisance. He also sought an award of attorney fees.

The matter came on for trial on May 4, 1999. Appellant failed to appear and the court ordered the matter dismissed. Appellant's subsequent motion to set aside the dismissal was granted and the matter was reset for trial on August 30, 1999. The matter was ultimately submitted on October 12, 1999, and on November 19, 1999, the trial court denied the petition. It ruled, in pertinent part, "The view restoration ordinance is a valid exercise of the city's police power and is not preempted by state law. [¶] In light of the whole record, there is substantial evidence which supports the findings contained in Resolution 98-21 and the findings that support the City Council's decision. [¶] Uncontradicted evidence in the record show[s] that the plaintiff had reasonable notice of the City Council's public hearings regarding his property and was given reasonable opportunity to be heard. Plaintiff's due process rights were not violated. [¶] [*Kucera v. Lizza* (1997) 59 Cal.App.4th 1141 [69 Cal.Rptr.2d 582]]." Appellant filed a notice of appeal on January 5, 2000.

On March 3, 2000, the City obtained from the superior court a warrant authorizing entry upon appellant's

property "for the sole and exclusive purposes of trimming, culling, and lacing trees and foliage." On March 10, 2000, appellant obtained a 90-day stay of execution upon the warrant. Appellant filed a petition for writ of supersedeas on June 8, 2000. We denied that petition on June 9, 2000.

Discussion

On appeal, appellant makes the following contentions: (1) the trial court erred in relying upon *Kucera v. Lizza, supra,* 59 Cal.App.4th 1141; (2) the ordinance violates the takings clause; (3) retroactive application of the ordinance deprives him of due process; (4) the ordinance is deceptive and uncertain; (5) as applied, the ordinance impermissibly expands the City's police power. We first address issues (1) and (5).

1. *Kucera v. Lizza and the City's Police Power*

In *Kucera v. Lizza, supra,* 59 Cal.App.4th 1141, the Court of Appeal considered the validity of an ordinance of the Town of Tiburon similar to the ordinance presented here. The stated purpose of the Tiburon ordinance was to establish "the right of persons to preserve views or sunlight which existed at any time since they purchased or occupied a property from unreasonable obstruction by the growth of trees" and to establish a process to achieve restoration of views and sunlight. (Tiburon Mun. Code, former §§ 15-1.A & 15-1.B.) In accord with the provisions of the ordinance, the Kuceras petitioned for informal dispute resolution with respect to trees located on the downhill lot across the street, on property owned by

Lizza. The Kuceras claimed the trees obstructed their views of the San Francisco Bay and the Marin County mainland. Lizza refused to participate in the process. The Kuceras filed a complaint in superior court seeking to compel restoration of their views and for abatement of a public nuisance. The trial court entered judgment in favor of Lizza concluding that the ordinance was unconstitutional and void because it was preempted by state law and was an arbitrary and unreasonable exercise of the police power.

The Court of Appeal reversed: " 'It is well settled that the state may legitimately exercise its police powers to advance aesthetic values. . . . "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." ' [Citations.] . . . [¶] . . . [¶] We hold the Tiburon ordinance is directed toward a valid police power goal – to preserve views and sunlight. Tiburon's choice of regulating obstructing trees and tree growth obviously bears a reasonable relationship to the achievement of those goals. [Citation.]" (59 Cal.App.4th at pp. 1148-1149.)

(1) Here, appellant contends that the Ordinance does not state a valid purpose because it states only that "the peace, health, safety and welfare of the community will be served by the adoption of this section." We disagree.

The ballot measure which was approved by the voters states the purposes of the Ordinance as follows: "The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City. The hillsides provide potential vista

points and view lots. The City's General Plan recognizes these natural resources and calls for their protection. The public health, safety and welfare of the City require prevention of needless destruction and impairment of these limited vista points and view lots. . . . [¶] Specifically, this Ordinance: [¶] 1. Protects, enhances and perpetuates views available to property owners and visitors because of the unique topographical features of the Palos Verdes Peninsula. These views provide unique and irreplaceable assets to the City and its neighboring communities. . . . [¶] 2. Defines and protects finite visual resources by establishing limits which construction and plant growth can attain before encroaching onto a view. [¶] 3. Insures that the development of each parcel of land or additions to residences or structures occur in a manner which is harmonious and maintains neighborhood compatibility and the character of contiguous sub-community development as defined in the General Plan." These purposes were reprinted in the View Restoration Permit Guidelines and Procedures issued by the City.

Enacting the Ordinance for these purposes is a [sic] clearly a legitimate exercise of the city's traditional police power. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886 [50 Cal.Rptr.2d 242, 911 P.2d 429]; *Kucera v. Lizza, supra,* 59 Cal.App.4th at p. 1149.) To the extent that the trial court cited *Kucera* for this proposition, it did not err.

2. *The Takings Issue*

We agree that the *Kucera* case is not dispositive of appellant's takings claim. The opinion specifically remanded the matter for further proceedings on this

issue: "The takings authorities cited by the parties are, of course, not directly pertinent. This is a facial challenge and, while it is hard to imagine on this record how compliance with the ordinance and resultant tree trimming might result in an unconstitutional taking, any such argument will have to await a remand and further proceedings." (59 Cal.App.4th at p. 1154.) (**2a**) Here, appellant contends that the ordinance is invalid "as applied," raising the taking issue.

(**3**) The takings clause of the Fifth Amendment to the federal Constitution provides "[N]or shall private property be taken for public use, without just compensation." "The aim of the Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' [(*Armstrong v. United States* [(1960)] 364 U.S. 40, 49 [80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554]).]" (*Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 522 [118 S.Ct. 2131, 2146, 141 L.Ed.2d 451].) Similarly, the California Constitution at article I, section 19, provides that "[p]rivate property may be taken or damaged for public use only when just compensation . . . has first been paid. . . . "

(**4**) A party challenging a governmental action as an unconstitutional taking bears a substantial burden. (*Eastern Enterprises v. Apfel, supra,* 524 U.S. at p. 523 [118 S.Ct. at pp. 2146-2147].) Not every destruction or injury to property by the government has been held to be a taking. (*Armstrong v. United States, supra,* 364 U.S. at p. 48 [80 S.Ct. at pp. 1568-1569].) The process for evaluating the constitutionality of a governmental action involves an examination of its "justice and fairness," for which there

is no set formula, and the inquiry is "essentially ad hoc and fact intensive." (*Eastern Enterprises, supra,* at p. 523 [118 S.Ct. at p. 2146].) Several factors which have been held to be particularly significant are: (1) the economic impact of the regulation; (2) its interference with reasonable investment backed expectations; and (3) the character of the governmental action. (*Eastern Enterprises, supra,* at pp. 523-524 [118 S.Ct. at p. 2146].)

There are two types of regulatory action which have been adjudicated to be "per se" takings without the necessity of weighing the public interest advanced in support of the restraint. Those are: (1) where the property owner has suffered a physical invasion of his property and (2) where the regulation denies all economically beneficial or productive use of land. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 [112 S.Ct. 2886, 2893, 120 L.Ed.2d 798].)

(**2b**) Contrary to appellant's arguments, the Ordinance does not itself compel a physical invasion of appellant's property. Rather, it is appellant's refusal to comply with Resolution No. 98-21, after ample notice and opportunity to correct, that has occasioned the threat of the City's entry onto the property. It does not therefore, rise to the level of a physical invasion. (*Yee v. Escondido* (1992) 503 U.S. 519, 527 [112 S.Ct. 1522, 1528, 118 L.Ed.2d 153]; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 7, 12 [32 Cal.Rptr.2d 244, 876 P.2d 1043]; *Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, 1358 [247 Cal.Rptr. 715].)

Likewise, we find unavailing appellant's attempt to analogize this case to *Lucas v. South Carolina Coastal Council, supra,* 505 U.S. 1003 as a denial of his "reasonable

investment backed expectations." In *Lucas*, the purchaser of two lots zoned for residential use was later precluded by state legislation from erecting *any* permanent habitable structures on the lots. Unlike the plaintiff in *Lucas*, appellant here is not deprived of any significant economically beneficial use of his land.

Here, while the City has imposed limitations on the height of preexisting foliage, it is a legitimate exercise of police power which does not rise to the level of a taking. Contrary to "per se" takings, "traditional land-use regulations" such as the imposition of minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions "have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property. [Citations.]" (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 886; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 518 [125 Cal.Rptr. 365, 542 P.2d 237] ["[A] zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging . . . "].) "The denial of the highest and best use does not constitute an unconstitutional taking of property. [Citation.] 'Even where there is a very substantial diminution in the value of land, there is no taking. . . . ' (*Long Beach Equities, Inc. [v. County of Ventura* (1991)] 231 Cal.App.3d [1016,] 1036 [282 Cal.Rptr. 877].)" (*Ramona Convent of the Holy Names v. City of Alhambra* (1993) 21 Cal.App.4th 10, 23 [26 Cal.Rptr.2d 140].)

It is even questionable whether there has been a diminution in the value of the land. Appellant cites the damage to his property as his loss of privacy and "utility saving cooling shade."

Appellant cannot show he has a vested right to foliage of a certain height or to a fixed amount of utility charges. In addition, appellant has not been ordered to destroy his trees, but simply to trim them. The City's resolution provides that the cost of the tree removal is to be borne by Keilbach and that reasonable replacement shrubbery is also to be purchased by him. If any of the trees or shrubs that is ordered trimmed dies within one year, Keilbach is to bear the expense of a replacement tree or shrub.

While appellant cherishes his park-like privacy, the regulation of tree heights throughout the city may indirectly increase the property's value, as the city becomes known for one which has scenic vistas. (See *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d at pp. 520-521.) As for the loss of his privacy, the VRC made a specific finding, after visiting Keilbach's property, that there was no unreasonable infringement of appellant's privacy "since the subject trees limit but do not totally eliminate all viewing onto the foliage owner's property from the applicant's property."

Accordingly, we find no taking as contemplated within the Fifth Amendment of the United States Constitution or article I, section 19 of the California Constitution.

3. *Due Process Claims*

a. *Retroactive Application*

(5) Appellant contends that retroactive application of the Ordinance amounts to irrational and arbitrary action. He also argues that the Ordinance allows view seekers to exact retribution against foliage owners and that the VRC did not appropriately balance the interests of the two property owners. In support of these arguments, he cites *Eastern Enterprises v. Apfel, supra,* 524 U.S. 498.

In *Eastern,* a company that formerly was in the coal mining business left that industry. Several years later, the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) was enacted, providing for assigned benefits to retirees in the coal industry. The effect of this act was to impose $50 million to $100 million worth of liability on the company based on its activities 30 to 50 years earlier. (524 U.S. at pp. 503, 516-517 [118 S.Ct. at pp. 2137, 2143].)

The company sued, claiming there was a taking and a violation of due process rights. (524 U.S. at pp. 517, 529 [118 S.Ct. at pp. 2143, 2149].) In concluding that the company's claims had merit, the Supreme Court noted that retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions. (*Eastern Enterprises v. Apfel, supra,* at pp. 532, 533 [118 S.Ct. at p. 2151].) The court concluded that the length of time that the Coal Act reached back to impose liability on the company and the magnitude of the liability raised substantial fairness question.

Here, there is no automatic retroactive reach of the ordinance. Homeowners are allowed to keep foliage at the height it existed on the effective date of the Ordinance. It is only when another homeowner applies for a view restoration permit that the inquiry begins whether the foliage must be trimmed to a lower height. (See discussion, *infra,* on vagueness claim.)

In addition, there is no showing that the ordinance was applied in an arbitrary or irrational manner. (*United States v. Carlton* (1994) 512 U.S. 26, 32 [114 S.Ct. 2018, 2022-2023, 129 L.Ed.2d 22].) The ordinance requires first resort to informal dispute resolution and provides for noticed hearings and rights of appeal. Keilbach and the City Council duly followed all the required steps. There is no factual basis for appellant's contention that the City or the VRC acted with an improper motive. In fact there is no reason given by appellant for Keilbach's actions against appellant other than view restoration.

b. *Uncertainty*

(6) Appellant contends that the ordinance is so unclear that it violates due process. He cites *Ross v. City of Rolling Hills Estates* (1987) 192 Cal.App.3d 370, 375 [238 Cal.Rptr. 561], for the tests for vagueness challenge as follows: (1) the statute must not forbid nor require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application; (2) the language must be definite enough to provide a standard of conduct as well as a standard by which adjudicating agencies can ascertain compliance; (3) the words used should be well

known enough to enable affected persons to understand and correctly apply them; they must be either of long-standing usage in the profession or industry involved or those which have be interpreted by the courts, or those which the meaning of which may be determined by knowledge and experience, or those which may be made reasonably certain by reference to common law or legislative history. (*Id.* at p. 375.)

The *Ross* case itself notes, " '[A] substantial amount of vagueness is permitted in California zoning ordinances' in order to permit delegation of broad discretionary power to administrative bodies. [Citations.]" (192 Cal.App.3d at p. 376, citing *Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682 [215 Cal.Rptr. 439].)

The Ordinance provides at section (B)(3): "3. Foliage Obstruction. No person shall significantly impair a view from a viewing area of a lot by permitting foliage to grow to a height exceeding: [¶] a. The height determined by the view restoration commission through issuance of a view restoration permit under Section 17.02.040 (C)(2) of this chapter; or [¶] b. If no view restoration permit has been issued by the view restoration commission, a height which is the lesser of: [¶] i. The ridge line of the primary structure on the property; or [¶] ii. Sixteen feet. [¶] If foliage on the property already exceeds the provisions of subdivisions (i) and (ii) of Section 17.02.040(B)(3) of this chapter on the effective date of this section, as approved by the voters on November 7, 1989, and significantly impairs a view from a viewing area of a lot, then notwithstanding whether any person has sought or obtained issuance of a view restoration permit, the foliage owner shall not let the foliage exceed the foliage height existing

on the effective date of this section (November 17, 1989). *The purpose of this paragraph is to ensure that owners of foliage which violates the provisions of this paragraph on the effective date of this section shall not allow the foliage to increase in height. This paragraph does not 'grandfather' or otherwise permit such foliage to continue to block a view."*[2] (Italics added.)

Appellant contends that the final paragraph of this section is so deceptive and uncertain as to violate due process principles, as demonstrated by the minutes of the City Council meeting held on July 1, 1997. In particular, appellant argues that it is unclear whether paragraph 3.b. applies when no VRC determination has been made or to all foliage in existence at the time of enactment.

Section (B)(3) can be fairly read without resort to other materials as follows: If a property owner had trees exceeding 16 feet prior to November 17, 1989, impairing the view of a neighbor, the property owner is prohibited from letting that foliage grow any higher whether or not the neighbor has obtained a view restoration permit. The final sentence means that if the neighbor does eventually seek a permit, the trees in excess of 16 feet can be ordered to be trimmed. We do not find this section to be either deceptive, unclear or uncertain.

Appellant also contends that section (C)(2)(f) of the Ordinance, which permits the VRC to recommend

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[2] The last two sentences were not contained in the original Proposition M. The first of these sentences was added when Proposition M was codified, the last one added when the ordinance was amended in 1997.

removal and replacement of trees is vague and confusing because there is no language indicating the consequences that befall a nonconsenting foliage owner. That section provides: "The view restoration commission may impose such reasonable conditions or restrictions on the approval of a view restoration permit as may be found to be appropriate or necessary to protect the public health, safety or welfare or the foliage owner's reasonable enjoyment of his or her property. Such conditions or restrictions may include, but are not limited to: (1) requiring the complete removal of the subject foliage when the commission finds that the trimming, culling, lacing or reducing of that foliage to sixteen feet or the ridge line is likely to kill the foliage, threaten the public health, safety and welfare, or will destroy the aesthetic value of the foliage that is to be pruned or reduced in height, provided that the property owner consents to the removal; and (2) requiring replacement of such foliage when the commission finds that removal without replacement will cause a significant adverse impact on: (a) the public health, safety, and welfare, (b) the privacy of the property owner, . . . provided that the property owner consents to the replacement."

We find no vagueness in this section either. The VRC is empowered to impose whatever reasonable conditions or restrictions as are appropriate or necessary "as may be found to be appropriate or necessary to protect the public health, safety, or welfare" in the event that a property owner does not consent to removal or replacement. There is nothing unconstitutional about this delegation of broad discretionary power to the VRC and the City. (*Ross v. City of Rolling Hill Estates, supra,* 192 Cal.App.3d at p. 376.)

DISPOSITION

The judgment of the superior court is affirmed.

Vogel (C. S.), P. J., and Epstein, J., concurred.

APPENDIX 2

RESOLUTION NO. 98-21

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES AFFIRMING THE APPROVAL OF VIEW RESTORATION PERMIT NO. 29 TO TOP, TRIM, AND/OR REMOVE TREES AT 30327 GANADO DRIVE.

WHEREAS, on February 18, 1997, Mr. and Mrs. Norbert Keilbach, who own property located at 3632 Greve Drive, in the City of Rancho Palos Verdes, filed an application for View Restoration Permit No. 29 ("Permit") to top, trim and/or remove several trees on the property located at 30327 Ganado Drive. ("the subject property"), owned by Mr. Jon Echevarrieta ("the foliage owner"); and

WHEREAS, pursuant to the requirements of the Municipal Code, notice of the hearing before the View Restoration Commission ("Commission"), along with copies of the Staff report, were mailed to the applicant and the foliage owner on April 1, 1997, 30 days in advance of the hearing; and

WHEREAS, on May 1, 1997, after all voting members of the View Restoration Commission had visited the site, the Commission held a duly noticed public hearing, to consider the request, at which time, all interested parties were given an opportunity to be heard and present evidence, the View Restoration Commission made all necessary findings, and approved View Restoration Permit No. 29 by adopting V.R.C. Resolution No. 97-5; and

WHEREAS, on May 16, 1997, within the fifteen day appeal period, Mr. Jon Echevarrieta, the foliage owner, appealed the Commission's decision to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Municipal Code, the City Council held a public hearing on July 1, 1997, at which time all interested parties were given an opportunity to be heard and present evidence on the notice of appeal; and

WHEREAS, after hearing all public testimony, and discussing the issues, the City Council remanded VRP No. 29 back to the View Restoration Commission: and

WHEREAS, on October 2, 1997, after all voting members of the View Restoration Commission had revisited the site, the Commission held a duly noticed public hearing to consider the request, at which time, all interested parties were given an opportunity to be heard and present evidence, the View Restoration Commission made all necessary findings, and approved View Restoration Permit No. 29; and

WHEREAS, on November 6, 1997, the View Restoration Commission adopted V.R.C. Resolution No. 97-21 as amended in the attached conditions outlined in Exhibit A; and

WHEREAS, on November 21, 1997, within the fifteen day appeal period, Mr. Jon Echevarrieta, the foliage owner, appealed the Commission's decision to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Municipal Code, the City Council held a public hearing on March 17, 1998, at which time all interested parties were given an opportunity to be heard and present evidence on the notice of appeal; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DOES FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: The applicant at 3632 Greve Drive has a view, as defined by Section 17.02.040 of the City's Development Code, which includes the Pacific Ocean and Catalina Island.

Section 2: The applicant's viewing area, as defined by Section 17.02.040 of the City's Development Code, includes: living room, dining room, and an outdoor patio area at the rear of the property at 3632 Greve Drive because these areas all share the same view of the ocean and Catalina Island.

Section 3: The subject property at 30327 Ganado Drive contains four (4) large Pine trees, one (1) Ash tree, one (1) Ornamental Plum tree, one (1) Olive tree, one (1) Scrub Oak tree, that significantly impair the applicant's view.

Section 4: The applicant has complied with the early neighbor consultation process and has shown proof of cooperation on their part to resolve conflicts, as evidenced by the letter dated February 13, 1997 and receipt for registered mail sent to the foliage owner at 30327 Ganado Drive.

Section 5: Based on evidence provided by the applicant, the subject trees at 30327 Ganado Drive significantly impair a substantial portion of the applicant's primary view. Two (2) Pine trees measure approximately 35 to 40 feet, one (1) Pine tree measures approximately 60 feet,

one (1) Pine tree measures 18-20 feet, the Ash tree measures approximately 35-40 feet, the Olive tree measures roughly 40-50 feet, the Ornamental Plum tree measures 20 feet, and the Scrub Oak tree measures roughly 40 to 50 feet tall. All trees exceed the ridge line of the primary structure of the foliage owners's property, which is approximately 26 feet in height as measured from the existing building pad grade. The ridgeline of the primary structure is located at a higher elevation than the 16 foot elevation measured from the existing base of each tree.

Section 6: The subject property is located less than one thousand (1,000) feet from the applicants property.

Section 7: The applicant's and foliage owner's properties were created in 1963. There is a solis [sic] report in the file demonstrating that the area was covered with brush and that the subject trees did not exist prior to the establishment of the lots.

Section 8: The recommended topping, trimming, and/or removal of the subject trees will not cause an increased or unreasonable infringement on the privacy of the foliage owner since the subject trees limit but do not totally eliminate all viewing into the foliage owner's property from the applicant's property. Further, replacement shrubs are required to be planted at the applicant expense to allow for additional screening.

Section 9: The foliage owner questioned the legality of the applicant's second story deck. Staff researched the issue and found that the Planning Department had approved the Site Plan Review for the deck, however, the building plan check for the project had expired. Prior to the start of the second VRC review, the applicant resolved

the matter with the City's Building and Safety Department and final building permit was issued.

Section 10: Based on the field review of the City's Geotechnical Consultant, the recommended removal of the subject Pine trees, without replacement of such foliage, could increase slope erosion. As a result, the City's Geotechnical Consultant has advised that: the Pine tree stumps and the root systems should remain intact and replacement shrubs shall be planted, as identified in Condition No. 2 of attached Exhibit "A", to further support the slope.

Section 11: The topping, trimming, and/or removal of the subject trees as identified in Conditions 1 through 7 of attached Exhibit "A", is necessary in order to restore the applicant's view.

Section 12: Pursuant to Section 15300 of the California Environmental Quality Act the proposed project is categorically exempt under Class 4 of that section because the work required to restore the applicants view does not include the removal of scenic and mature trees as identified by the City of Rancho Palos Verdes General Plan (Visual Aspects; Figure 41).

Section 13: The time within which the judicial review of the decision reflected in this Resolution, if available, must be sought is governed by Section 1094.6 of the California Code of Civil Procedure.

Section 14: For the foregoing reasons and based on the information and findings included in the Staff Report, Minutes and other records of proceedings, which are attached hereto by reference, the City Council of the City

of Rancho Palos Verdes hereby denies the appeal, thereby upholding the View Restoration Commission's decision with modifications to the conditions of approval attached as Exhibit A, and approves View Restoration Permit No 29 to top, trim, and/or remove trees at 30327 Ganado Drive in order to restore the view from 3632 Greve Drive, as requested and provided for in the conditions outlined in the attached Exhibit "A" and the attached plot plan diagram.

PASSED, APPROVED, AND ADOPTED on the 7th day of April 1998.

/s/ Barbara J. Ferraro
Mayor

ATTEST:

/s/ JO PURCELL
City Clerk

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss
CITY OF RANCHO PALOS VERDES)

I, Jo Purcell, City Clerk for the City of Rancho Palos Verdes, hereby certify that the above Resolution No. 98-21 was duly and regularly passed and adopted by the said City Council at a regular meeting held on April 7, 1998.

City Clerk

EXHIBIT "A"
CONDITIONS OF APPROVAL
VIEW RESTORATION PERMIT NO. 29

1. Pine Trees No. 1, 2, & 3: Remove Pine trees No. 1, No. 2, and No. 3, with the consent of the foliage owner. However, if the foliage owner does not grant the authority to remove the trees, then the crowns of all three trees shall be topped to the level of the applicants pad and maintained in such a manner. Additionally, the applicant shall pay for the planting of a mid-slope privacy barrier. The barrier shall consist of a variety of plants (not more than 20 to 25 plants), to be selected by the foliage owner from a list provided by Staff. Final selection and placement of the plant materials shall be made by the foliage owner, reviewed by the City Arborist, and approved by the Director of Planning, Building, and Code Enforcement. The City Arborist shall provide the foliage owner with all the information that will assist the foliage owner in selecting the appropriate plantings, including but limited to, the distance of the plantings from the top of the slope, the natural mature height of the selected foliage and the anticipated frequency and costs of maintenance of the foliage.

2. To prevent increased slope erosion, the stumps and the root systems of Pine trees No. 1, 2, and 3 should remain intact and the area shall be replanted with Acacia Redolens, or a similar plant species approved by the Director of Planning, Building and Safety, and Code Enforcement. Any newly planted foliage shall be maintained at a height that will not impair a view from another property in the future.

3. Pine Tree No. 4: Pine tree No. 4 shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the

ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

4. Ash Tree: The ash tree shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

5. Olive Tree: The Olive tree shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

6. Ornamental Plum Trees: The Ornamental Plum shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

7. Scrub Oak Tres [sic]: The Scrub Oak shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

8. Pursuant to Section V-A-4 of the VRP Guidelines and Procedures, any tree or shrub that is removed shall be cut flush to the ground leaving the root systems and stumps in place.

9. If any tree or shrub that is ordered to be culled, laced, or trimmed as specified in this permit, dies within one year of the initial work being performed due to the performance of the work, the applicant or any subsequent owner of the applicant's property shall be

responsible for providing a replacement tree or shrub to the foliage owner. The replacement foliage shall be provided in accordance with the specifications described in Section V-E of the VRP Guidelines and Procedures.

10. No sooner than one year after the initial trimming is completed, City Staff shall report to the Commission as to the adequacy of the maintenance schedule, as well as the foliage owner's ability to maintain the foliage in compliance with these conditions of approval. The Commission shall consider the Staff report and determine if a public hearing to amend the conditions is necessary. If the Commission determines that a hearing is necessary, then a hearing will be held pursuant to Section V.I. of the VRP Guidelines and Procedures.

11. The applicants should, not later than 30 days after approval of this permit, present to the City, at least one itemized estimate to carry out the aforementioned work. Such estimate is to be supplied by a licensed landscape or licensed tree service contractor, acceptable to the City, which provides insurance certificates in a form acceptable to the City, and shall include all costs of cleanup and removal of debris. In addition, the applicant shall pay to the City an amount equal to the City selected estimate and such funds shall be maintained in a City trust account until completion of work.

12. The foliage owners shall select a contractor from the estimates provided by the applicants or another licensed firm of their choice subject to approval by the City, to perform the required work. However, the foliage owner shall only be reimbursed for the amount of the lowest bid submitted by the applicant. If the foliage owner chooses to do the required work

himself, then the foliage owner shall not be compensated from the trust account and the amount in the trust account shall be refunded to the applicant.

13. The applicant may reduce the scope of the trimming required by this Permit by giving the City and the foliage owner written notice of such decision within 30 days of this approval. The applicant shall deposit funds to the City in a trust account in an amount sufficient to cover the remaining work. However, trimming or removal of the vegetation which the applicants have chosen to eliminate would then require an entirely new View Restoration application and fee.

14. The applicant may withdraw his view restoration request and his trust account funds if the applicant does so within five (5) days after the applicant has sent the estimate required herein. In the event that the applicant withdraws his/her request in a timely manner, the foliage owner is not required to perform the work specified by this Permit and this Permit is of no further force and effect.

15. The foliage owner shall, no later than 90 days after the Notice of Approval (First Notice) is mailed, complete the work to the extent required by this Permit, and shall maintain the vegetation to a height that will not impair a view from another property in the future as specified in these Conditions of Approval.

16. The City shall reimburse the foliage owner from the City's trust account, not later than 30 days after receipt of the appropriate billing and the satisfactory completion of the required work specified by this Permit, as verified by City Staff, in an amount not to exceed the amount of the applicant's trust account.

17. If the required work as specified herein is not completed within the stipulated time periods, then the

City of Rancho Palos Verdes will authorize a bonded tree service to perform the foliage removal work at the subject property at the foliage owner's expense. In the event that the City is required to perform the work at the foliage owner's expense, the City shall reimburse the applicant from the City trust account not later than 30 days after the City completes the work.

18. Subsequent to the trimming or removal of the foliage, Staff will document the restored view for future reference by submitting to the applicant, foliage owner, and Director of Planning, Building and Code Enforcement, photographs of the restored view taken from the applicant's viewing area along with a "Documentation of Existing Foliage or View."

APPENDIX 3

ORDINANCE NO. 319

AN ORDINANCE OF THE CITY OF RANCHO PALOS VERDES ADOPTING AMENDMENTS TO SECTION 17.02.040 OF THE CITY OF RANCHO PALOS VERDES MUNICIPAL CODE

WHEREAS, on June 9, 1994, the Planning Commission and View Restoration Commission conducted a joint Sub-Committee workshop to discuss potential amendments to Section 17.02.040 (Proposition M) of the City's Municipal Code; and

WHEREAS, on June 30, 1994, the City Council and View Restoration Commission conducted a joint workshop to discuss potential amendments to Section 17.02.040 (Proposition M) of the City's Municipal Code; and

WHEREAS, on January 21, 1995, the City Council, Planning Commission and View Restoration Commission conducted a joint workshop to discuss potential amendments to Section 17.02.040 (Proposition M) of the City's Municipal Code; and

WHEREAS, after notice pursuant to the provisions of the Rancho Palos Verdes Municipal Code, Planning Commission public hearings were held on March 23, 1994, May 24, 1994, November 9, 1994, December 13, 1994, January 24, 1995 and October 10, 1995, to consider amendments to Section 17.02.040, at which time all interested parties were given an opportunity to be heard and present evidence regarding said amendments; and

WHEREAS, the Planning Commission adopted P.C. Resolution No. 95-45 on November 14, 1995 recommending to the City Council certain amendments to Section 17.02.040; and

WHEREAS, View Restoration Commission public hearings were held on October 27, 1994, November 17, 1994, December 1, 1994, and April 20, 1995, to consider amendments to Section 17.02.040, at which time all interested parties were given an opportunity to be heard and present evidence regarding said amendments; and

WHEREAS, the View Restoration Commission adopted V.R.C. Resolution No. 95-02 on May 4, 1995 recommending to the City Council certain amendments to Section 17.02.040; and

WHEREAS, after notice pursuant to the provisions of the Rancho Palos Verdes Municipal Code, City Council public hearings were held on February 20, 1996, March 11, 1996, May 21, 1996 and July 2, 1996, at which time all interested parties were given an opportunity to be heard and present evidence regarding said amendments; and

WHEREAS, as a result of the City Council public hearings, the City Council directed Staff to prepare further amendments to Section 17.02.040; and

WHEREAS, the amendments were reviewed and approved by the Planning Commission on August 19, 1996 and by the View Restoration Commission on August 15, 1996, and forwarded to the City Council for its final review and consideration on August 20, 1996, September 17, 1996 and December 17, 1996.

NOW THEREFORE THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DOES HEREBY FIND, DETERMINE, AND ORDAIN AS FOLLOWS:

Section 1: The City Council has reviewed and considered the amendments to Section 17.02.040 of the Municipal Code.

Section 2: The City Council finds that the amendments to Section 17.02.040 are consistent with California Government Code Section 65853, zoning amendment procedures.

Section 3: The City Council finds that the amendments to Section 17.02.040 are consistent with the Rancho Palos Verdes General Plan and Coastal Specific Plan in that they uphold, and do not hinder, the goals and policies of those plans, in particular to carefully control and direct future growth towards making a positive contribution to all elements of the community.

Section 4: The City Council finds that the amendments to Section 17.02.040 are consistent with the purposes and intent of Proposition M in that the amendments to the Proposition M language merely relocate, reorganize or clarify the Proposition M text.

Section 5: The City Council finds that the amendments to Section 17.02.040 are substantially the same as previous provisions of the Rancho Palos Verdes Municipal Code or any other ordinance repealed, amended or superseded upon the enactment of this ordinance and that the amendments to Section 17.02.040 be construed as a restatement and continuation of these previous provisions and not as new enactments.

Section 6: The City Council further finds that the amendments to Section 17.020.040 do not have the potential to create a significant effect on the environment and therefore are determined to be categorically exempt (Class 8) from the California Environmental Quality Act (CEQA).

Section 7: The City Council further finds that the amendments to Section 17.02.040 are necessary to preserve the public health, safety, and general welfare in the area.

Section 8: For the foregoing reasons and based on the information and findings included in the staff reports and records of the proceedings, Section 17.02.040 of Chapter 17.02 of Title 17 of the City of Rancho Palos Verdes Municipal Code is hereby amended to read as follows:

17.02.040 View preservation and restoration. The residents of the city of rancho palos verdes by the adoption of this section, have made a finding that the peace, health, safety and welfare of the community will be served by the adoption of this section and by the regulations prescribed herein.

A. Definitions. When not inconsistent with the context, the words used in the present tense include the future; words in the singular number include the plural; and those in the plural number include the singular. In carrying out the intent of this section, words, phrases and terms shall be deemed to have the following meanings ascribed to them:

1. "City" means the city of rancho palos verdes and its employees and staff and those designated by the city council to act on behalf of the city.

2. "City council" means the duly elected legislative body of the city of rancho palos verdes.

3. "Director" means the director of the planning, building and code enforcement department of the city of rancho palos verdes.

4. "Foliage" means natural growth of trees, shrubs and other plant life.

5. "Lot coverage" means that portion of a lot or building site which is occupied by any building or structure, including trellises; decks over thirty (30) inches in height, as measured from existing adjacent grade; parking areas; or driveways.

6. "Neighborhood character" means the existing characteristics in terms of the following:

a. Scale of surrounding residences;

b. Architectural styles and materials; and

c. Front yard setbacks.

7. "Planning Commission" means the planning commission of the city of rancho palos verdes as defined in chapter 2.20 (Planning Commission) of this municipal code.

8. "Privacy" means reasonable protection from intrusive visual observation.

9. "Scale" means the total square footage and lot coverage of a residence and all ancillary structures.

10. "Setback" means the minimum horizontal distance as prescribed by this code, between any property line or private easement boundary used for vehicular and/or pedestrian access and the closest point on any building or structure, below or above ground level, on the property. In cases where there is no structure on a lot, setback shall mean the minimum horizontal distance between the property line or easement boundary line and a line parallel to the property line or easement boundary line. Please refer to chapter 17.48 (Lots, Setbacks, Open Space Area and Building Height) for setback regulations.

11. Shall and May. "Shall" is mandatory and "may" is permissive.

12. "Structure" means anything constructed or built, any edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner, which is located on or on top of the ground on a parcel of land utilized for residential purposes, excluding antennas, skylights, solar panels, and similar structures not involving the construction of habitable area.

13. "Style" means design elements which consist of, but are not limited to:

a. Facade treatment;

b. Height of structure;

c. Open space between structures;

d. Roof design;

e. The apparent bulk or mass of the structure; and

f. The number of stories.

14. View. On the palos verdes peninsula, it is quite common to have a near view and a far view because of the nature of many of the hills on the peninsula. Therefore, a "view" which is protected by this section is as follows:

a. A "near view" which is defined as a scene located on the peninsula including, but not limited to, a valley, ravine, equestrian trail, pastoral environment or any natural setting; and/or

b. A "far view" which is defined as a scene located off the peninsula including, but not limited to, the ocean, los angeles basin, city lights at night, harbor, vincent thomas bridge, shoreline, or offshore islands.

A "View" which is protected by this section shall not include vacant land that is developable under the city code, distant mountain area not normally visible, nor the sky, either above distant mountain areas or above the height of offshore islands. A view may extend in any horizontal direction (three hundred sixty degrees of horizontal arc) and shall be considered as a single view, even if broken into segments by foliage, structures or other interference.

15. "Viewing area" means that area of a structure (excluding bathrooms, hallways, garages, or closets) or that area of a lot (excluding the setback areas) where the owner and city determine the best and most

important view exists. In structures, the finished floor elevation of any viewing area must be at or above existing grade adjacent to the exterior wall of the part of the building nearest to said viewing area.

16. The "view restoration commission" means a planning commission for limited purpose, as defined by chapter 2.21 (View Restoration Commission) of this municipal code, appointed by the city council to consider applications for view restoration permits and city tree review permits. The terms and qualifications of office shall be established by the city council. The commission shall consist of seven members and three alternates, representing as diverse a geographical mix of members and alternates as is practical. The view restoration commission shall draft regulations and policies to guide the actions of the commission, which shall be binding after approval by the city council. In the event the workload of the view restoration commission declines to an amount deemed by the city council to make the continuation of the view restoration commission impractical, the city council shall disband the view restoration commission and transfer its work to the planning commission created and established by chapter 2.20 (Planning Commission) of this municipal code. When the term "planning commission" is referred to in this code, it shall mean the "planning commission of the city of rancho palos verdes" as defined in chapter 2.20 (Planning Commission), and shall not mean the "view restoration commission" as defined in this section.

B. Regulations.

1. Building Height. Any individual or persons desiring to build a structure or an addition to an existing structure exceeding sixteen (16) feet in height, may apply for a height variation permit, which, if granted pursuant to the procedures contained herein, will permit the individual to build a structure not exceeding twenty-six (26) feet in height, except as provided in section 17.02.040(B)(1)(d) of this chapter; or such lower height as approved by the city, measured as follows:

a. for sloping lots which slope uphill from the street of access or in the same direction as the street of access and for which no building pad exists, the height shall be measured from the preconstruction (existing) grade at the highest point on the lot to be covered by the structure to the ridgeline or the highest point of the structure, as illustrated in figure 1 below.

[Figure 1 omitted in printing]

b. For sloping lots which slope downhill from the street of access and for which no building pad exists, the height shall be measured from the average elevation of the setback line abutting the street of access to the ridge line or the highest point of the structure, as illustrated in figure 2 below.

[Figure 2 omitted in printing]

c. For lots with a "building pad" at street level or at a different level than the street or lot configurations not previously discussed, the height shall be measured from the preconstruction (existing) grade at the highest elevation of the existing building pad area

covered by the structure to the ridge line or highest point of the structure, as illustrated in figure 3 below. Portions of a structure which extend beyond the "building pad" area of a lot shall not qualify as the highest elevation covered by the structure, for the purposes of determining maximum building height. Structures allowed pursuant to this subsection shall contain no more than one (1) story (cellars and basements are exempted from this requirement) and shall not exceed twenty (20) feet in height, as measured from the point where the lowest foundation or slab meets finished grade, to the ridgeline or highest point of the structure. Otherwise, a height variation permit shall be required.

[Figure 3 omitted in printing]

d. On sloping lots described in sections 17.02.040(B)(1)(a) and 17.02.040(B)(1)(b) of this chapter, the foundation of the structure shall contain a minimum eight (8) foot step with the slope of the lot, as illustrated in Figure 4 below. However, no portion of the structure shall exceed thirty (30) feet in height, when measured from the point where the lowest foundation or slab meets finished grade to the ridge line or highest point of the structure. The thirty (30) foot height shall not exceed a horizontally projected sixteen (16) foot heightline (from the high point of the uphill step of the structure).

2. Setbacks for Sloping Lots. On lots which slope uphill from the street of access and where the height of a structure is in excess of sixteen (16) feet above the point where the lowest foundation or slab meets the ground, areas in excess of the sixteen (16) foot height limit shall be set back one (1) foot from the exterior

building facade of the first story, most parallel and closest to the front property line, for every foot of height in excess of sixteen (16) feet, as measured from the point where the lowest foundation or slab meets the ground, as illustrated in Figure 4 below.

[Figure 4 omitted in printing]

3. Foliage Obstruction. No person shall significantly impair a view from a viewing area of a lot by permitting foliage to grow to a height exceeding:

a. The height determined by the view restoration commission through issuance of a view restoration permit under section 17.02.040(C)(2) of this chapter, or,

b. If no view restoration permit has been issued by the view restoration commission, a height which is the lesser of:

(i) the ridge line of the primary structure on the property, or

(ii) sixteen (16) feet.

If foliage on the property already exceeds the provisions of subdivisions (i) and (ii) of section 17.02.040(B)(3) of this chapter on the effective date of this section, as approved by the voters on november 7, 1989, and significantly impairs a view from a viewing area of a lot, then notwithstanding whether any person has sought or obtained issuance of a view restoration permit, the foliage owner shall not let the foliage exceed the foliage height existing on the effective date of this section (november 17, 1989). The purpose of this paragraph is to

ensure that owners of foliage which violates the provisions of this paragraph on the effective date of this section shall not allow the foliage to increase in height. This paragraph does not "grandfather" or otherwise permit such foliage to continue to block a view.

4. Removal of Foliage as Condition of Permit Issuance. The city shall issue no conditional use permit, variance, height variation, building permit or other entitlement to construct a structure, or to add livable area to a structure on a parcel utilized for residential purposes, unless the owner removes that part of the foliage on the lot exceeding sixteen (16) feet in height or the ridge line of the primary structure, whichever is lower, that significantly impairs a view from the viewing area of another parcel. The owner of the property is responsible for maintaining the foliage so that the views remain unimpaired. This requirement shall not apply where removal of the foliage would constitute an unreasonable invasion of the privacy of the occupants of the property on which the foliage exists and there is no method by which the property owner can create such privacy through some other means allowed within the development code that does not significantly impair a view from a viewing area of another property. The initial decision on the amount of foliage removal required or the reasonable degree of privacy to be maintained shall be made by the director, the planning commission or the city council, as appropriate for the entitlement in question. If the permit issuance involves property located within the miraleste recreation & park district, the findings of section 17.02.040(C)(2)(c)(vi) of this chapter shall apply. A decision by the director on either of these matters may be

appealed to the planning commission, and any decision of the planning commission may be appealed to the city council.

5. Determination of viewing area.

a. The determination of a viewing area shall be made by balancing the nature of the view to be protected and the importance of the area of the structure or lot from where the view is taken. Once finally determined for a particular application, the viewing area may not be changed for any subsequent application. In the event the city and owner cannot agree on the viewing area, the decision of the city shall control. A property owner may appeal the city's determination of viewing area. In such event, the decision on the viewing area will be made by the body making the final decision on the application. A property owner may preserve his or her right to dispute the decision on the viewing area for a subsequent application, without disputing the decision on a pending application, by filing a statement to that effect and indicating the viewing area the property owner believes to be more appropriate. The statement shall be filed with the city prior to consideration of the pending application by the city.

C. Procedures and Requirements.

1. Preservation of views where structures are involved.

a. Any person proposing to construct a structure above sixteen (16) feet shall submit a height variation permit application to the city. A determination

on the application shall be made by the director in accordance with the findings described in section 17.02.040(C)(1)(e) of this chapter. The director shall refer a height variation application directly to the planning commission for consideration under the same findings, as part of a public hearing, if any of the following is proposed:

i. Any portion of a structure which exceeds sixteen (16) feet in height extends closer than twenty-five (25) feet from the front or street-side property line; or

ii. The area of the structure which exceeds sixteen (16) feet in height (the second story footprint) exceeds seventy-five percent (75%) of the existing first story footprint area (residence and attached garage);

iii. Sixty percent (60%) or more of an existing garage footprint is covered by a structure which exceeds sixteen (16) feet in height (a second story); or

iv. Based on an initial site visit, the director determines that any portion of a structure which is proposed to exceed sixteen (16) feet in height may significantly impair a view as defined in this chapter.

b. The applicant shall take reasonable steps established by the city council to consult with owners of property located within five hundred (500) feet of the applicant's property. The applicant shall obtain and submit with the application, the signatures of the persons with whom the applicant consulted. Where a homeowners' association existing in the neighborhood affected

has provided written notice to the director of its desire to be notified of height variation applications, the applicant shall mail a letter to the association requesting its position on the application. A copy of this letter and the response of the association, if any, shall be submitted with the application. A fee shall be charged for the application as established by resolution of the city council.

c. the director shall, by written notice, notify property owners within a five hundred (500) foot radius of the subject property and the affected homeowners' association, if any, of the application and inform them that any objections to the proposed construction must be submitted to the director within thirty (30) calendar days of the date of the notice.

d. the applicant shall construct on the site at the applicant's expense, as a visual aid, a temporary frame of the proposed structure.

e. An application to build to the maximum height permitted in section 17.02.040(B)(1) of this chapter may be granted, with or without conditions, if the following findings can be made:

i. The applicant has complied with the early neighbor consultation process established by the city.

ii. The structure does not significantly impair a view from public property (parks, major thoroughfares, bike ways, walkways or equestrian trails) which has been identified in the city's general plan or coastal specific plan, as city-designated viewing areas.

iii. The proposed structure is not located on a ridge or a promontory.

iv. The structure is designed and situated in such a manner as to minimize impairment of a view.

v. There is no significant cumulative view impairment caused by granting the application. Cumulative view impairment shall be determined by: (a) considering the amount of view impairment caused by the proposed structure; and (b) considering the amount of view impairment that would be caused by the construction on other parcels of structures similar to the proposed structure.

vi. The proposed structure, when considered exclusive of existing foliage, does not significantly impair a view from the viewing area of another parcel. If the viewing area is located in a structure, the viewing area shall be located in a portion of a structure which was constructed without a height variation (~~modification~~) permit or variance, or which would not have required a height variation or variance when originally constructed had this section, as approved by the voters on november 7, 1989, been in effect at the time the structure was constructed, unless the viewing area located in the portion of the existing structure which required a height variation (~~modification~~) permit or variance constitutes the primary living area (living room, family room, dining room, or kitchen) of the residence.

vii. The proposed structure complies with all other code requirements.

viii. The proposed structure is compatible with the immediate neighborhood character.

ix. The proposed structure does not result in an unreasonable infringement of the privacy of the occupants of abutting residences.

f. Written notice of the director's or planning commission's decision shall be sent to the applicant, his/her representative and to all parties who responded to the original notice.

g. The decision of the director may be appealed to the planning commission by the applicant or any person who responded in writing to the director prior to the director's decision, provided the appeal is filed in writing within fifteen (15) calendar days after the date of the director's decision. The appellant shall pay an appeal fee as established by resolution of the city council.

h. Notice of the public hearing for an initial determination of a height variation application by the planning commission or an appeal to the planning commission and/or city council shall be mailed thirty (30) calendar days prior to the hearing, to property owners within five hundred (500) feet of the applicant's property, as well as any additional property owners previously determined by the city to be affected by the proposal.

i. In hearing an appeal of the director's decision, the planning commission shall grant the application and cause a permit to be issued, only if it finds that all of the requirements of section 17.02.040(C)(1)(e) of this chapter have been met.

j. A decision of the planning commission may be appealed to the city council by the applicant or any person who commented orally or in writing to the planning commission, provided the appeal is filed in writing within fifteen (15) calendar days after the date of the planning commission's decision. The appellant shall pay an appeal fee as established by resolution of the city council. In order to grant a permit, the city council must determine that all of the requirements listed in section 17.02.040(C)(1)(e) of this chapter have been met.

2. Restoration of Views Where Foliage is a Factor.

a. Any resident owning a residential structure with a view may file an application with the city for a view restoration permit. The applicant shall file with the application proof that the applicant consulted, or attempted to consult, with the property owner whose foliage is in question. The applicant shall pay a fee for the view restoration permit as established by resolution of the city council.

b. The application shall be submitted to the view restoration commission. Written notice of the time and place for the hearing on the application shall be sent to the applicant and the property owner(s) of the foliage involved at least thirty (30) calendar days prior to the meeting of the commission. Commission members shall inspect the site prior to the public hearing. Only view restoration commission members who make a site inspection may participate in the public hearing.

c. In order for a view restoration notice to be issued, the commission must find:

i. The applicant has complied with the early neighbor consultation process and has shown proof of cooperation on his/her part to resolve conflicts.

ii. Foliage exceeding sixteen (16) feet or the ridge line of the primary structure, whichever is lower, significantly impairs a view from the applicant's viewing area, whether such foliage is located totally on one property, or when combined with foilage located on more than one property.

iii. The foliage to be removed is located on property, any part of which is less than one thousand (1,000) feet from the applicant's property line(s).

iv. The foliage significantly impairing the view did not exist, as view impairing vegetation, when the lot from which the view is taken was created.

v. Removal or trimming of the foliage will not cause an unreasonable infringement of the privacy of the occupants of the property upon which the foliage is located.

vi. For property located within the boundaries of the miraleste recreation & park district, the commission shall also find the removal or trimming of the foliage strikes a reasonable balance between meeting the purposes of section 17.02.040 of this chapter, as set forth in the ordinance approved by the voters on november 7, 1989, and preserving the historical developments of the miraleste recreation & park district area with a large number of tress.

d. Should the commission make findings requiring issuance of a view restoration permit, the director shall send a notice to the property owner to trim, cull, lace or otherwise cause the foliage to be reduced to sixteen (16) feet or the ridge line of the primary structure, whichever is lower, or such limit above that height which will restore the view. The property owner will have ninety (90) calendar days to have the foliage removed. The applicant shall be responsible for the expense of the foliage removal and/or replacement ordered pursuant to this subsection only to the extent of the lowest bid amount provided by contractors licensed to do such work in the city of rancho palos verdes and selected by the applicant. If after ninety (90) calendar days the foliage has not been removed, the city of rancho palos verdes will authorize a bonded tree service to trim, cull, lace or remove the identified foliage at the owner's expense. After the initial trimming, culling, lacing or removal of the foliage, the owner, at the owner's expense, shall be responsible for maintaining the foliage so that the view restoration required by the view restoration permit is maintained.

e. To the extent legally permissible, trees or foliage on property owned by any governmental entity, except the city and the miraleste recreation & park district, shall be subject to view restoration control, as per the provisions of this section, except that the foliage shall be trimmed or removed thirty (30) calendar days following issuance of the notice. Trees and/or foliage located on city property, or in the public right-of-way, as defined in

chapter 17.96 (Definitions), shall be subject to view restoration control, as per the provisions of this section, pursuant to the city tree review permit procedure contained in section 17.76.100 (City Tree Review Permit.)

f. The view restoration commission may impose such reasonable conditions or restrictions on the approval of a view restoration permit as may be found to be appropriate or necessary to protect the public health, safety or welfare. Such conditions or restrictions may include, but are not limited to, (1) requiring the complete removal of the subject foliage when the commission finds that the trimming, culling, lacing or reducing of that foliage to sixteen (16) feet or the ridge line is likely to kill the foliage or to threaten the public health, safety and welfare, provided that the property owner consents to the removal; and (2) requiring replacement of such foliage when the commission finds that removal without replacement will cause an adverse impact on the public health, safety and welfare or will adversely impact the safety or privacy of the property owner, provided that the property owner consents to the replacement.

g. The applicant, the owner of the property where the foliage is located, or any other interested person may appeal the decision of the view restoration commission to the city council by filing with the city clerk a written notice of appeal, including the grounds for the appeal, and any specific action being requested by the appellant, together with the appeal fee established by resolution of the city council, within fifteen (15) calendar days after the view restoration commission adopts the resolution setting forth its decision. The decision of the view restoration commission is final if no appeal is filed

within fifteen (15) calendar days. If such appeal is timely and properly filed, a copy of the findings of the view restoration commission and all materials on file with the director shall be transmitted to the city council, which shall be part of the appeal hearing record, together with the notice of appeal and any other written materials submitted by interested parties. Additional written materials shall be submitted to the city clerk at least seven (7) calendar days prior to the date that the appeal will be heard by the city council.

Upon receiving the notice of appeal, the city clerk shall schedule the matter for review at a forthcoming meeting of the city council. At the city council meeting, oral testimony shall be limited to five (5) minutes in length for each of the parties whose properties are affected by the decision and two (2) minutes per person for other individuals. Oral testimony shall be limited to the issues raised in the written appeal. At the conclusion of the oral presentation, the city council may do one of the following:

i. Affirm the decision of the view restoration commission and approve the application upon finding that all applicable findings have been correctly made and all provisions of section 17.02.040(C)(2) of this chapter are complied with; or

ii. Approve the application but impose additional or different conditions as the city council deems necessary to fulfill the purposes of section 17.02.040(C)(2) of this chapter; or

iii. Disapprove the application upon finding that all applicable findings cannot be made

or all provisions of section 17.02.040(C)(2) of this chapter have not been complied with; or

iv. Refer the matter back to the view restoration commission to conduct further proceedings. The remanded proceedings may include the presentation of significant new evidence which was raised in conjunction with the appeal. The city council shall state the ground(s) for the remand and shall give instructions to the view restoration commission concerning any error found by the city council in the commissions's prior determination.

Section 9: The provisions of this Ordinance shall apply to all complete view restoration permit applications on file with the City where an initial determination has not yet been made by the view restoration commission, and to all height variation permit applications submitted after the effective date of the Ordinance.

Section 10: The City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law.

PASSED, APPROVED AND ADOPTED this 7th day of January, 1997.

/s/ JOHN McTAGGART
MAYOR

ATTEST:

/s/ JO PURCELL
CITY CLERK

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS
CITY OF RANCHO PALOS VERDES)

I, JO PURCELL, City Clerk of the City of Rancho Palos Verdes do hereby certify that the whole number of members of the City Council of said City is five; that the foregoing Ordinance No. 319, passed first reading on December 17, 1996, was duly and regularly adopted by the City Council of said City at a regular meeting thereof held on January 7, 1997, and that the same was passed and adopted by the following roll call vote:

AYES:	FERRARO, BYRD, HOLLINGSWORTH, LYON AND MAYOR McTAGGART
NOES:	NONE
ABSENT:	NONE
ABSTAIN:	NONE

/s/ Jo Purcell
CITY CLERK

Supreme Court, U.S.
FILED
SEP 14 2001
OFFICE OF THE CLERK

No. 01-2

IN THE

Supreme Court of the United States

JON ECHEVARRIETA,
Petitioner,

vs.

THE CITY OF RANCHO PALOS VERDES, a Municipal Corporation; THE CITY OF RANCHO PALOS VERDES CITY COUNCIL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
SECOND APPELLATE DISTRICT
DIVISION FOUR

PETITIONER'S REPLY BRIEF

ROBERT HAMPTON ROGERS
Counsel of Record

SULLIVAN, WORKMAN & DEE, LLP

800 South Figueroa Street
Twelfth Floor
Los Angeles, California 90017
(213) 624-5544

Attorneys for Petitioner
JON ECHEVARRIETA

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

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SULLIVAN, WORKMAN & DEE, LLP

800 South Figueroa Street
Twelfth Floor
Los Angeles, California 90017
(213) 624-5544

Attorneys for Petitioner
JON ECHEVARRIETA

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions presented by Respondent's Brief in Opposition to Petition for Writ of Certiorari are:

Does a municipality's enforcement of a view ordinance which requires the destruction of one property owner's trees in order to grant a view to another property owner constitute a "Bona Fide Issue of Public Importance"? (*Brief in Opposition to Petition for Writ of Certiorari*, 4);

and

Is the lower court's analysis adequate when enforcement of a view ordinance mandates DESTRUCTION of trees instead of "merely" regulating "the minor and incidental matter of foliage height"? (*Brief in Opposition to Petition for Writ of Certiorari*, 6)

A. THE PETITION PRESENTS AN ISSUE OF NATIONAL IMPORT

The issue here is whether a city can enact an ordinance that requires a taking or destruction of one property owner's trees so that another property owner can have a view.

This is an issue that is important to every city that enacts and enforces a view ordinance.

The fact that Respondent's proposed actions would result in the death of Petitioner's trees is undisputed–the administrative record clearly indicates that the pine trees would die if chopped to five foot stumps as ordered by Respondent.

Yet, Respondent attempts to trivialize and minimize the undisputed fact of destruction by reiterating time and again the "minor" and "*de minimus*" (*Respondent's Brief in Opposition*, 7), nature of Respondent's action:

> "The Ordinance in question *merely* regulates the *minor* and *incidental* matter of foliage height."
>
> *Respondent's Brief in Opposition*, 6 (emphasis added)

Not only does Respondent conveniently fail to recognize the significance of its act of killing and taking mature thirty year old trees, but it extends this failure to the nation as a whole, insisting that this case has "no significance whatsoever to anyone but the smattering of local jurisdictions involved in view preservation."

Apart from making this questionable assertion without any support in the record or in its brief, Respondent's contention is false.

The instant case is one of first impression in California and sets an important precedent.

If left to stand, municipalities will be able to ignore established takings law, due process laws and non-conforming use laws and simply legislate the destruction of trees without necessity of compensating the tree owner.

Petitioner asserts that far from being "insignificant" (*Respondent's Brief in Opposition*, 4), this decision will determine the fairness and justice of treating the destruction of mature trees in the same manner as parking restrictions or height limitations on "junk piles". (*Respondent's Brief in Opposition*, 17)

B. A TAKINGS ANALYSIS MUST BE MADE PRESUMING THE DESTRUCTION OF PETITIONER'S TREES NOT THE TRIMMING OF PETITIONER'S TREES

Subsequent to Petitioner's Petition for Writ of Certiorari, this court, in *Anthony Palazzolo v. Rhode Island, et al.*, 121 S. Ct. 2448, 2001 U.S. Lexis 4910, after finding that the case was appropriate for determining the takings issue,

remanded the matter to determine the petitioner's claims under "the *Penn Central* analysis." (*Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2465)

While Respondent City contends that the court of appeal applied the criteria for determining a taking that was used in *Penn Central Transportation Co., et al. v. New York City, et al.*, 438 U.S. 104 (1978), and found that there was little or no economic impact on Petitioner (*Respondent's Brief in Opposition*, 12), it is clear that the court of appeal based it's finding of no taking on two questionable grounds:

1. First the court of appeal based its finding of little or no economic impact and therefore no taking on the mistaken assumption that Petitioner "has not been ordered to destroy his trees, but simply to trim them." (*Petitioner's Appendix A*14)

and

2. Second, the court of appeal based its analysis on the conjecture that it is "questionable whether there has been a diminution in value" and the ordinance "may indirectly increase the property's value" (*Petitioner's Appendix A*14).

These erroneous assumptions and speculations by the court of appeal substituted for a straightforward takings analysis.

The court of appeal cavils with distinctions between "per se" takings, "legitimate exercise of police power" and "traditional land-use regulations", (*Petitioner's Appendix A*13) never submitting the facts of the case to the test as enunciated in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which test was the same as that set forth in *Penn Central*.

CONCLUSION

Petitioner is required by the City to bear the burden of the City's view ordinance.

In enforcing the view ordinance, the City is poised to enter Petitioner's property and chop three mature trees down to five foot stumps, leaving them to die.

The City's position is that such actions do not constitute a taking.

Petitioner asserts that he is entitled to an analysis as to whether the City's actions go too far and constitute a taking–an analysis which the court of appeal failed to make.

DATED: September 12, 2001

Respectfully submitted,

SULLIVAN, WORKMAN & DEE, LLP

ROBERT HAMPTON ROGERS
Counsel of Record

No. 01 -3 JUN 26 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

GREGORY FLINT TAYLOR,
Petitioner,

v.

JOE HAMILTON, Secretary, North Carolina Department of Correction; LYNN PHILLIPS, Director of Prisons; MICHAEL BUMGARNER, Superintendent, Nash Correctional Center; MICHAEL EASLEY, Attorney General of North Carolina; STATE OF NORTH CAROLINA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Thomas Franklin Loflin III
Counsel of Record
LOFLIN & LOFLIN
P.O. Box 1315
Durham, North Carolina 27702
(919) 682-0383

Counsel for Petitioner

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

QUESTION PRESENTED

Whether a criminal defendant is denied his Sixth Amendment right to effective assistance of counsel from the individual or cumulative effect of the following deficiencies of trial counsel: (1) failure to object to inculpatory hearsay which allows in evidence an unconfronted statement contrary to the overall theory of the defense; (2) failure to interview potential defense witnesses and thus learn about witnesses who could rebut the key prosecution witness and who could rebut evidence of the acts of a dog which the prosecution contended circumstantially incriminated the defendant; (3) failure to object to prejudicial and improper remarks during the prosecutor's closing argument; and (4) failure to investigate the case sufficiently to give advice to the defendant about whether he should testify in his own defense?

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which adopted the reasoning of the District Court's Order denying habeas corpus relief for a state prisoner.

OPINIONS BELOW

The Judgment and unpublished Opinion of the U.S. Court of Appeals for the Fourth Circuit filed March 28, 2001, appears at Appendix A of the Petition. The unpublished Order denying habeas corpus relief by the U.S. District Court for the Eastern District of North Carolina, which the Fourth Circuit opinion upheld, appears at Appendix B. The order of the highest state court to review the case, the Supreme Court of North Carolina, filed March 4, 1999, appears at Appendix C to the Petition and, being an Order denying certiorari. The Superior Court of Wake County, North Carolina, upon a hearing on Petitioner's Petition for Motion for Appropriate Relief, entered a written Order denying the Motion on December 10, 1998, which appears at Appendix D.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its Order upholding the District Court's denial of habeas corpus relief on March 28, 2001. This Court has jurisdiction to review the judgment of the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States, which reads: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defense."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, Section 1, which reads: "...nor shall any State deprive any person of life, liberty, or property, with-out due process of law...."

STATEMENT OF THE CASE

The Petitioner Gregory Flint Taylor is a North Carolina prison inmate serving a sentence of life imprisonment imposed on April 19, 1993, in Wake County (N.C.) Superior Court for first degree murder. Petitioner appealed his conviction to the North Carolina Supreme Court, which on September 9, 1994, filed an opinion finding no error. Petitioner filed a Motion for Appropriate Relief in the Superior Court of Wake County, which Motion, as amended, was denied and dismissed after an evidentiary hearing by Order filed on December 10, 1998, and served by first-class mail on counsel for Petitioner on December 16, 1998. Thereafter, Petitioner filed a Petition for Writ of Certiorari in the North Carolina Supreme Court for review of the denial of his Motion for Appropriate Relief. The Supreme Court denied his Petition for Writ of Certiorari on March 4, 1999. Petitioner sought issuance of a writ of habeas corpus by the District Court. By a Judgment and accompanying Order entered September 12, 2000, Chief District Judge Malcolm J. Howard, granted the Respondent's motion for summary judgment and dismissed the Petitioners' habeas corpus petition. Petitioner then appealed to the Court

of Appeals for the Fourth Circuit, which on March 28, 2001, found no error in the Order of the District Court and dismissed Petitioner's appeal.

REASONS FOR GRANTING THE WRIT

I. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, AND THE COURTS BELOW DECIDED THIS CASE CONTRARY TO DECISIONS OF THIS COURT AND FOUND FACTS WHICH ARE NOT ONLY UNSUPPORTED BY THE RECORD BUT REFUTED BY THE RECORD.

A. THE FAILURE OF TRIAL COUNSEL TO OBJECT TO INADMISSIBLE HEARSAY IN VIOLATION OF PETITIONER'S RIGHTS TO CONFRONTATION OF WITNESSES WAS UNREASONABLE AND PETITIONER WAS PREJUDICED AS A RESULT.

Appellant Gregory Taylor originally retained James Blackburn, formerly U.S. Attorney for the Eastern District of North Carolina, to represent him in the defense of his first degree murder indictment. Because of disciplinary action by the North Carolina State Bar, Mr. Blackburn was unable to defend Mr. Taylor at trial. Michael Dodd of the Wake County Bar and R.L. Adams, who was in Mr. Blackburn's former law firm, represented the Petitioner at trial.

Trial counsel Mr. Dodd and Mr. Adams sat by without objecting when the prosecuting attorney asked a State's witness, Detective Johnny Howard, about an

interview he had with one-time co-Defendant, Johnny Beck. This clearly hearsay testimony was unreasonably found by the state court and by the District Court (Order at p. 11) to be reasonable trial tactics by trial counsel and not to prejudice the Respondent. The exchange occurred as follows:

> Q: Did you have occasion yourself personally to question Johnny Beck?
> A: Yes, I did.
> Q: During the course of that questioning did you have occasion to ask Mr. Beck if he saw any other person near or around the body at any time on the evening of or the early morning hours of September the 26th, 1991?
> A: I did.
> Q: What did he tell you?
> A: He did not.
> Q: He denied seeing this person in the white shorts or red shorts. Did you give him ample opportunity to tell you that that person existed?
> A: Yes, sir, I did.
> Q: And he never mentioned that person to you?
> A: No, he did not.

(T Tr. p. 298) (emphasis added). Beck did not testify at Petitioner's trial.

Trial counsel were manifestly ineffective at trial in failing to object to the above line of questioning because any statement that co-defendant Beck made out-of-court was inadmissible hearsay; and, not only hearsay, the admission of testimony about Beck's out-of-court statements quoted above violated the Petitioner's rights to confrontation of witnesses,

guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

It is manifest from a reading of the trial transcript that the State's purpose for introducing Beck's unconfronted extrajudicial statements was to prove Petitioner lied to the police during a police interrogation of him shortly after the discovery of the body. A tape recording of Petitioner's interrogation was played to the jury, and a transcript of same was introduced into evidence as State's Exhibits 38 and 39. During this interrogation, Petitioner told the interviewing detective that he and Beck saw a body lying where the victim was later found, and that Beck called Petitioner's attention to the fact that someone was standing in the circle (or cul-de-sac) over the victim's body. Without objection, the State was allowed to elicit from Detective Howard that when he and another officer questioned Beck, Mr. Beck stated that he did not see any other person near or around the body as Petitioner had claimed they both saw. (T Tr. p. 298).

The failure of Petitioner's trial counsel to interpose both hearsay and constitutional confrontation-rights objections to the admission into evidence of the out-of-court statements of Beck was clearly ineffective. See, e.g., *Henry v. Scully*, 918 F.Supp. 693, 715 (S.D.N.Y. 1995), *aff'd.* 78 F.3d 51 (2d Cir. 1996) ("counsel's performance is unreasonable" when he fails to object to prejudicial inadmissible hearsay).

The prejudice to Petitioner of his trial counsel's failure to object to the constitutionally inadmissible statements of Beck is overwhelmingly demonstrated by the prosecutor's own argument to the jury:

....[A]t two hundred yards [the Defendant] can tell not only that it is a male standing over her body, this mysterious male but he's either got on a red shirt and white pants or a white shirt and red pants....

And what is more important about that is this: You are Johnny Beck. You know that you are about to get charged with murder, too. You don't know what your codefendant has said or when the police say, did you see anybody else at the scene? Was anybody else there? You don't even mention this man that you have seen standing over the body just as you are leaving. That is--man, they had four and a half hours to get their story straight but they must have missed, somebody missed that part. Either this defendant got too creative or Mr. Beck couldn't remember what he was suppose [sic] to say but there isn't any reason in this world somebody knowing that they are getting ready to be charged with murder, wouldn't say, gosh, yeah, there was this guy that was standing over the body. I told him about it.

You heard me ask the officer, did you ask him [Beck] if anybody else was there? Did you give him a chance? Johnny Beck never mentioned the mystery man. It is a figment of this defendant's imagination.

....[I]t is obvious when you take into context of this evidence that it isn't true. Well, we know he lied to his wife.

(T Tr. p. 571, line 6 through p. 572, line 13) (emphasis added).

In *State v. Bass*, 121 N.C.App. 306, 465 S.E.2d 334 (1996), the Court of Appeals granted a new trial in a first-degree sex offense case where the prosecutor on final argument argued facts excluded under the rape shield law. In the case at bar, the prosecutor argued facts that were inadmissible under the hearsay rule and under the confrontation clauses; in the case at bar these facts were in evidence solely because of defense counsel's deficient and unreasonable failure to object to them. In Bass, defense counsel objected to the argument of the prosecutor and won on appeal; in the case at bar, there was no objection.

In his findings of fact, the State post-conviction judge found the following:

> 33. ...Trial counsel were desirous as part of a trial strategy, to question the detective about the unconscionable manner in which he questioned each defendant in an effort to obtain a confession, (i.e. telling each that the other had claimed that his codefendant had committed the murder.) Further trial counsel wanted the jury to know that inspite [sic] of these tactics that both defendant and codefendant Beck had continued to deny involvement by themselves or their codefendant.

(emphasis added);

> 36. Trial counsel did illicit [sic] testimony in length about the questionable methods used by the detective as well as the defendant's and codefendant's steadfast assertion of innocence despite the use of said tactics.

(emphasis added). See Appendix D.

These findings are unreasonably wrong, and are contradicted by the trial transcript; thus they are not supported by the record before the State court. It is true that Mr. Dodd testified at the post-conviction evidentiary hearing that he was able to elicit testimony from Detective Howard about unconscionable tactics Howard used in his interrogation of the co-Defendant Johnny Beck. Mr. Dodd stated that he "specifically did not object to that [hearsay testimony], knowing it was objectionable, because I had a reason to use that at a later time, and did, in fact, do that at a later time." (MAR- 1 Tr. p. 19-20). At various other times during his testimony, Mr. Dodd stated that he was able to get Detective Howard to admit to using unconscionable tactics with Johnny Beck. (See, e.g., MAR-1 Tr. p. 21-23) ("what I did ask [Detective Howard] about was the same tactics that they used against Johnny Beck that they used against Greg, that is, they lied to Greg and told Greg that Johnny had said that Greg did it, which Johnny had not done, and they did the same thing with Johnny Beck. Told Johnny that Greg had said that he did it when he didn't. They were seeking to obtain a confession from either or both of these people by what I thought to be unconscionable means....that's when this tactic occurred of lying to each of them in trying to get them to make a statement. That's what I wanted the jury to know and that's why, why I did what I did in that regard."); (MAR-1 Tr. p. 25) ("Howard repeatedly admitted that he lied as an interrogation tactic?" "Yes, to both of them."); (MAR-1 Tr. p. 26) ("But I felt if [the jury] knew that the police had consistently lied throughout the case to both people that they felt were principal suspects would be of use to, help to us."); (MAR-1 Tr. p. 30) ("I did what I thought was appropriate based on a trial tactic decision at that time to seize on that, so that he would open the door for me to go back later and bring out the, the other instances of unconscionable misconduct by the police [in interviewing Johnny Beck].").

The State court heard all of the above testimony during the evidentiary hearing, and his findings of fact indicate that he accepted Mr. Dodd's testimony as true. However, the trial transcript shows that Mr. Dodd did not elicit the testimony from Detective Howard, as he claimed he did. (T Tr. pp. 299-352). Mr. Dodd was either genuinely mistaken or intentionally misleading the State court, as a review of the trial transcript very clearly shows. Mr. Dodd did elicit such testimony about Detective Howard's methods of interrogation of the Petitioner Gregory Taylor, but Mr. Dodd admitted he could have done that without letting in the damaging hearsay. (MAR-1 Tr. p. 84). At no point in the trial did Mr. Dodd elicit testimony from Detective Howard regarding unconscionable tactics used by Detective Howard when interrogating Johnny Beck. Thus, the State court's findings #33, #35 and #36 are not supported by the record; they are contradicted by it.

Further, Dodd should have known that no such unconscionable techniques were used in the interrogation of the co-Defendant Johnny Beck. Dodd testified that he "read through every document in the file." (MAR-1 Tr. p. 55). He certainly must have read the transcript of Johnny Beck's interrogation--it was in his trial notebook, with notes written on it. (Beck Interview, pp. 1-28). Dodd must have known, therefore, that Detective Howard used no unconscionable tactics in his interrogation of Johnny Beck, even though he admittedly did when interrogating the Petitioner. Dodd had no reason to think that allowing the hearsay testimony to come in would allow him to question Detective Howard about some techniques that he knew Howard did not even use.

Mr. Dodd did not need the hearsay evidence quoted *supra* to open any doors. Mr. Dodd could have cross-examined Detective Howard about his interrogation techniques regardless of the hearsay testimony, as Mr. Dodd himself admitted in the MAR evidentiary hearing:

Q: But you would agree with me, would you not, Mr. Dodd, that you certainly had the right to ask the detective, even if there was no such person as the codefendant, you could have asked the detective about, about his interrogation technique in front of the Jury?

A: Sure.

Q: As to how he elicited the tape recorded statement?

A: No question about that.

Q: You could have gotten him to admit that he lied to Greg Taylor during the inter- rogation process?

A: Assuming he would tell the truth, yes, and he did tell the truth apparently.

(MAR-1 Tr. p. 84-5). In fact, as discussed above, Mr. Dodd only focused at trial on the unconscionable tactics Detective Howard used in his interrogation of Gregory Taylor. Mr. Dodd admitted in the evidentiary hearing that even "if Johnny Beck had never been mentioned by anybody or even if he didn't exist, if the police in interrogating [Gregory Taylor] lied to him the way they admitted they did," Mr. Dodd could have "brought that out before the jury without any reference to Johnny Beck." (MAR-1 Tr. p. 30).

Further, Mr. Dodd admitted that he "didn't want the jury to hear [about the hearsay evidence] in the first place." (MAR-1 Tr.p. 62). This is wholly inconsistent with Mr. Dodd's assertion that it was part of his trial strategy to allow this evidence to get before the jury. The hearsay evidence does not show unconscionable police tactics--it shows a fatal inconsistency between Petitioner's story and that of co-Defendant, and was actually contrary to Mr. Dodd's stated strategy that he "wanted the jury to know that Johnny's

statement [to the police], with minor exceptions, was perfectly consistent with Greg's." (MAR-1 Tr. p. 22).

But the only part of Mr. Beck's statement which was presented to the jury was the part that Mr. Dodd failed to object to--the part that was in serious conflict with Petitioner's story and in conflict with the theory of the defense.

From the foregoing testimony by Mr. Dodd, it is readily apparent that while his trial strategy did involve cross-examination of Detective Howard to reveal unsavory police interrogation techniques as to his own client, his overarching trial strategy was to obtain a dismissal for insufficiency of prosecution evidence and, failing that, get the last jury argument in reliance on what he perceived as the weakness of the State's case. (MAR-1 Tr. 26-27, 29, & 31). Therefore, to be consistent with and faithful to his proclaimed strategy, Mr. Dodd critically needed to keep out the one glaring inconsistency between the Petitioner's and co-Defendant's statements to the police. Given this, it is clear that allowing the complained-of confrontation violation of Petitioner's rights to occur was inconsistent with and destructive to the overall trial strategy.

In any event, trial counsel's "opening the door" mantra shows a deficient knowledge of the law of evidence. Mr. Dodd did not need to allow the confrontation clause violation to occur as a predicate to questioning the detective about his interrogation techniques with the Petitioner, as Mr. Dodd ultimately admitted on cross-examination. Mr. Dodd's protestations that he allowed the confrontation clause violation to occur is an after-the-fact rationalization to protect his reputation--not a legitimate trial tactic. The record shows this to be true, and the State judge's findings to the contrary are thus an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). As *Williams* recognizes, "tactics as a matter of

reasonable performance" under the *Strickland* test cannot automatically justify trial counsel's omissions. 529 U.S. at 373, 120 S.Ct. at 1502. A contrary view is manifestly contrary to clearly established law of this Court.

In light of Mr. Dodd's testimony as to his overarching trial strategy, the fatal damage to that strategy, and the evidence through the unconfronted Beck hearsay that Petitioner was lying to the police about Mr. Beck's and Petitioner's seeing a third person near the body, the failure of Petitioner's trial counsel to object to seriously damaging testimony which they readily could have excluded (or set up reversible error by objecting to) clearly satisfies the prejudice prong of the *Strickland* test. The State court's finding of no prejudice is both contrary to and an unreasonable application of *Strickland* within the meaning of 28 U.S.C. §2254(d)(1). *Williams*, *supra*, 529 U.S. at 374, 120 S.Ct. at 1502-3. Thus, the Fourth Circuit's Order below upholding what the State courts and District Court did should be reversed.

B. PETITIONER WAS PREJUDICED BY TRIAL COUNSEL'S FAILURE TO INTERVIEW WITNESSES ESSENTIAL TO PETITIONER'S DEFENSE.

Trial counsel failed to adequately prepare for trial, in that they did not interview witnesses who were essential to Petitioner's defense. Specifically, trial counsel did not investigate the possibility that the testimony of Ernest Andrews could be shown to be untrue. Trial counsel failed to interview key witnesses who were in the cell with Petitioner and Mr. Andrews at the time Petitioner allegedly made a "jailhouse confession."

The failure to conduct an adequate, proper pretrial investigation to uncover witnesses with knowledge of facts that refute relevant facts testified to by a prosecuting witness is manifestly ineffective within the meaning of *Strickland v.*

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Williams v.Taylor, supra*, 529 U.S. at 396, 120 S.Ct. at 1514-15. See also *Hooper v. Garraghty*, 845 F.2d 471 (4th Cir. 1988) (applying *Strickland* to failure to adequately investigate pretrial).

The code of professional responsibility D.R. 6-101 (A) further provides that once a case has been accepted, a lawyer shall not handle a legal matter without adequate preparation in the circumstances. *Via v. Superintendent Powhatton Correctional Center*, 643 F.2d 167, 174 (4th Cir. 1981) (emphasis added). Here, defense counsel had Andrews' statement in advance of trial and knew what his testimony was going to be, when Petitioner allegedly made the "jailhouse confession" (within 24 to 36 hours of being jailed), and what cellblock Petitioner was in when he made the alleged admissions. Yet counsel did nothing to investigate whether there had in fact been such jailhouse admissions by Petitioner or whether there was evidence to refute that there had been.

The crucial role of pretrial investigation is well-recognized. *See, e.g., Rummel v. Estelle,* 590 F.2d 103, 104 (5th Cir. 1979) (pretrial investigation and preparation are the keys to effective representation), *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984) (effective representation hinges on adequate investigation and pretrial preparation [mere appearance of an in-court effectiveness cannot compensate for inadequate pretrial preparation]); *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985) (at a minimum, counsel has the duty to interview potential witnesses and to make adequate investigation of the facts and circumstances of the case. This duty is reflected in the American Bar Standards for Criminal Justice); *Aldrich v. Wainwright*, 777 F.2d 630 (11th Cir. 1985) (failure to conduct meaningful pretrial investigation satisfies first prong of *Strickland* test); *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) (reasonable performance of counsel includes an adequate investigation of

facts, consideration of viable theories and development of evidence to support those theories).

In the case at bar, the failure of defense counsel to do a proper investigation of the "jailhouse confession" was extremely prejudicial. The failure of defense counsel to discover witnesses who could contradict Andrews was crucial. Andrews was the only witness offered by the State who testified Petitioner admitted to being present when the victim was actually murdered and acting in concert with Johnny Beck. Other than Andrews' testimony about Petitioner's purported jailhouse admissions, the State's case against the Petitioner was purely circumstantial.

Mr. Dodd well in advance of trial was given a copy of Andrews' statement, and "knew essentially what that testimony was going to be." (MAR-1 Tr. p. 32). Mr. Dodd testified that "there would have been no way to find [witnesses to refute Andrews' testimony] unless we knew something about who they were or certainly had a name or something. It would have been, it would have been next to impossible to do that." (MAR-1 Tr. p. 64). Even though Mr. Dodd realized the utility such witnesses would have, he failed to investigate the possibility that there were other former cellmates of Petitioner who could refute the allegations of Mr. Andrews. (MAR-1 Tr. p. 36-7). Years later, post-conviction counsel was able to find two such witnesses--Shane Todd and Paul Eastridge. These two witnesses testified that Petitioner never made statements such as Mr. Andrews claimed he did. Had he done even a cursory investigation of this issue, Mr. Dodd would have been able to find at least these two witnesses, and almost surely more, through jail records.

In his testimony, Mr. Dodd admitted that Petitioner had told him that Andrews was lying. (MAR-1 Tr. p.35). Mr. Taylor gave a list of names to his former counsel, Mr. James Blackburn--a list of approximately ten people whom he remembered being in the cell-block with him. (MAR-1 Tr.

pp. 99-100). This list included the names of Mr. Todd and Mr. Eastridge. Mr. Dodd also stated that he "read through every document in the file" he received from Mr. Blackburn when he took over the case. (MAR-1 Tr. p. 55). Additionally, Petitioner indicated to Mr. Dodd during the trial that he wanted the jailhouse witnesses to testify to refute Andrews. (MAR-3 Tr. p. 95-97). Mr. Andrews testified that there were twelve or fifteen other people in the cell with them. (T Tr. p. 402). Mr. Andrews even testified that "there were several of us setting [sic] around at that time," when Petitioner was talking about some of the facts underlying his charge. (T Tr. p. 403).

The record thus leads to the conclusion that Mr. Dodd was on notice that there were witnesses who might be able to refute Mr. Andrews' testimony. He might have inferred it, as well, from Petitioner's assertion that Andrews was lying, or from Petitioner's assertion that he never told anyone in jail anything about his case. Moreover, Mr. Dodd should have been put on notice when he saw the list of names of cellmates in the file he acquired from Mr. Blackburn. Mr. Dodd has no justification for not investigating further.

The State court's conclusion that "Defendant gave Dodd no indication that there were inmates who could refute [Andrews'] statement" is thus unreasonable in light of the evidence presented in the evidentiary hearing and clear and convincing evidence refutes the foregoing finding by the State judge. As Petitioner's attorney, Mr. Dodd had a professional obligation to investigate all possible avenues of defense available to Petitioner. His failure to do so constitutes constitutionally ineffective assistance of counsel to Petitioner's prejudice. That prejudice is aptly illustrated by the fact that the State dismissed first degree murder charges against the co-Defendant Beck for lack of evidence to prosecute him. The only pre-trial difference between Petitioner and Beck is that the State had a "jailhouse informer"--Andrews--to testify against Mr. Taylor. He was

not in Beck's cellblock and the State therefore had no such evidence against the co-Defendant Beck.

For the foregoing reasons, the State court's post-conviction order was both contrary to *Strickland*, *supra*, and also an unreasonable application of it. *Williams v. Taylor*, *supra*.

C. THE COURTS BELOW MANIFESTLY ERRED IN FINDING THAT TRIAL COUNSEL'S FAILURE TO SECURE AN EXPERT IN CANINE BEHAVIOR TO CONFRONT THE TESTIMONY OF THE STATE'S CANINE EXPERT WOULD NOT HAVE AIDED PETITIONER'S DEFENSE.

Trial counsel were further ineffective for failing to adequately prepare to confront or cross-examine the testimony of the State's canine expert. The failure to conduct an adequate, proper pretrial investigation and to adequately prepare is manifestly ineffective within the meaning of *Strickland*, *supra*, and the other cases cited *supra*. If Mr. Dodd had hired a canine expert, it could have aided him in two respects. First, it would have allowed him to rebut the State's conclusions as to the meaning of the dog's behavior. Secondly, Mr. Dodd could have consulted with a canine expert to better prepare himself to cross-examine the State's canine expert.

In finding #63 (Appendix D), the State court found that trial counsel's failure to use a rebuttal canine expert was not ineffective because the rebuttal expert's testimony could only have shown that the decedent was not in Petitioner's truck, and a State's witness, Ms. Kelly, testified at trial that decedent was in the truck. This finding is arbitrary and erroneous due to an unreasonable interpretation of the facts in light of the clear and convincing evidence in the state court record.

Ms. Kelly did not testify at trial that the decedent, Jacquitta Thomas, was in Petitioner's truck. She testified, instead, that she saw the Petitioner and co-Defendant with a girl named "Jackie," whom she unequivocally stated was not the decedent. (T Tr 290-93). Finding #63 is thus based on a clearly unreasonable interpretation of the facts in the State trial record; an error also made by the State Supreme Court on direct appeal. *State v. Taylor*, 344 N.C. 31, 473 S.Ed.2d 596 (1996).

If indeed Ms. Kelly had testified that decedent was in the Petitioner's truck, it was important that Petitioner undermine such testimony. Defense counsel could and should have put on a canine expert to dispute that evidence, as was done during the evidentiary hearing of the Motion for Appropriate Relief. (MAR-2 Tr. pp. 27-95, 122-124).

Again, the State trial court's Order on this issue was contrary to *Strickland*, *supra*, and also an unreasonable application of it to the discrete facts of this case. The District Court was wrong in its failure to so find, and the Fourth Circuit erred in failing to find the District Court erred in this respect.

D. THE COURTS BELOW IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THREE PORTIONS OF THE PROSECUTOR'S CLOSING ARGUMENT ON THE GROUND THAT THOSE REMARKS DID NOT PREJUDICE PETITIONER, EVEN THOUGH THE DISTRICT COURT AND COURT OF APPEALS FOUND THAT AT LEAST TWO OF THE REMARKS WERE IMPROPER.

Trial counsel were also deficient and ineffective at trial for failure to object to three portions of the prosecutor's closing argument that were improper. Accordingly, defense

counsel deprived Petitioner of the opportunity for the trial judge to correct these improprieties at trial, and further subjected the Petitioner to a higher standard on appeal--the "gross impropriety" standard. Petitioner did not testify. The improper arguments were as follows:

(A) "Generally in a homicide, there's two kinds of parties there, the victim who can't say anything, and the perpetrator, who won't say anything."

(B) "The defendant has got to explain something to you."

(C) "It's your duty to speak for the people of the State of North Carolina when there's another side to what Mr. Dodd says and I know y'all will do that even though I can't do it because obviously I'll be sitting there with my turn having come and gone but don't think that I'm not wishing that I had, that I'm not wishing that I had spoken about something that he mentioned when there's another side."

Appellate counsel, who was different from trial counsel, attempted to raise (A) and (B) in the Supreme Court of North Carolina on direct appeal, but that court ruled the above-quoted statements in (A) and (B) were not so grossly improper as to require the trial judge to intervene ex mero motu. *State v. Taylor*, 344 N.C. 31, 473 S.Ed.2d 596 (1996).

The comments quoted in (A) and (B) amount to an unconstitutional comment on Petitioner's election not to testify. Similar comments have been held to constitute reversible error by many federal appellate courts. *See, e.g.*,

U.S. v. Kallin, 50 F.3d 689 (9th Cir. 1995) (error for prosecutor to comment on the defendant's silence); *U.S. v. Hardy*, 37 F.3d 753 (1st Cir. 1994) (prosecutor's comment reversible error because it implied defendant was hiding behind his right to silence); *U.S. v. Sardelli*, 813 F.2d 654 (5th Cir. 1987); *U.S. v. Griggs*, 735 F.2d 1318 (11th Cir. 1984) (prosecutor's comment, "the defendant has not testified about it" held to be reversible error); *U.S. v. Barton*, 731 F.2d 669 (10th Cir. 1984) (prosecutor's comments on failure of defendant to take witness stand held to be reversible error); *U.S. v. Flannery*, 451 F.2d 880 (1st Cir. 1971).

The argument in (C) to the jury invited the jurors to become advocates for the State. It was the jury's duty to serve as impartial judges of the facts. Thus this argument violated rights secured to the Petitioner to an impartial jury guaranteed him by the Sixth and Fourteenth Amendments to the U.S. Constitution. Numerous federal courts have held that such arguments constitute reversible error. *See, e.g., U.S. v. Managhan*, 741 F.2d 1434 (D.C. Cir. 1984), *cert. den.*, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985) (prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve order, or deter future lawbreaking); *U.S. v. Barlin*, 686 F.2d 81 (2d Cir. 1982) (prosecutor improperly appealed to the jury's passion and emotion in characterizing its job as the occasion on which jury has a duty to do something about crime); *U.S. v. Hawkins*, 595 F.2d 751 (D.C. Cir. 1978), *cert. den.*, 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 380 (1979); *U.S. v. Barker*, 553 F.2d 1013 (6th Cir. 1977).

Had trial counsel properly objected, the Petitioner at least would not have had (A) and (B) decided under the very rigorous "gross impropriety" standard on appeal. As (C) was arguably grossly improper, appellate counsel was deficient and ineffective in failing to raise it on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

Contrary to the Appellate Court's finding, the proof of prejudice is not the shortness of the State's commentary on Petitioner's failure to testify, it is the comments at all, especially where they undermined trial counsel's overarching strategy. In any event, losing the proper standard of appellate review was extremely prejudicial. And, finally, the District Court's failure to view each deficiency in original counsel's performance in sum total, rather than in isolation, is plain wrong under *Williams v. Taylor*, *supra.*

E. THE COURTS BELOW ERRED IN FINDING THAT PETITIONER WAS FULLY AND ADEQUATELY ADVISED OF HIS RIGHT TO TESTIFY AT TRIAL AND THIS FINDING WAS UNREASONABLE ON THE RECORD OF THIS CASE.

Trial counsel were further ineffective in failing to adequately advise Petitioner on whether he should testify in his own defense.

In the evidentiary hearing, Mr. Dodd testified that:

> We knew we could not put on character evidence for Greg, not because he didn't have good character in particular, but because there was [sic] incidents in his past that would come out to the jury we didn't want the jury to know, incidents of drug activity and alcohol activity and problems at home and convictions we didn't want the jury to know.

(MAR-1 Tr. p. 28-29). When asked by undersigned counsel what it was about Petitioner's past that he did not want the jury to know, Mr. Dodd replied that:

> There were some instances of which I had been told by the prosecutor about some, some in- stances in which he was, some 404(b) type evidence involving cocaine and alcohol and possibly some incidents with his wife that we did not want out in front of the jury. I didn't want anything about problems with his wife or family in front of the jury.

(MAR-1 Tr. p. 48).

Mr. Dodd was clearly not familiar with the facts. He was wrong when he listed the alleged "404(b) evidence" that he thought would be a problem for Petitioner, and the reason he was wrong is that he had not adequately prepared the case. He did not know what prior bad acts, if any, Petitioner had committed which might possibly be introduced to the jury. The fact that he did not know leads to the conclusion that he could not have adequately advised Petitioner whether to testify or not.

Petitioner never told Mr. Dodd that he had assaulted his wife, or anyone else, for that matter. (MAR-3 Tr. pp. 107-08). He never told Mr. Dodd that he had been convicted of any crimes of violence. (MAR-3 Tr. p. 108). The fact is that Petitioner had never been charged with or convicted of any such crimes. Rebecca Taylor, Petitioner's wife at the time in question, testified that Mr. Dodd never discussed the upside or downside of testifying. (MAR-3 Tr. p. 121). She testified she told Mr. Dodd's co-counsel that counsel need not worry about violence toward her by Petitioner. (MAR-3 Tr. p. 122).

Before this case, Petitioner had never been convicted of anything but traffic offenses, and breaking a window when he was eighteen years old. (MAR-3 Tr. p. 108-09). The traffic violations involved impaired driving and minor traffic infractions. (MAR-3 Tr. p. 109). There were no crimes

involving cocaine or any other drugs, as Mr. Dodd incorrectly stated in the evidentiary hearing. There were no crimes involving violence, as Mr. Dodd incorrectly stated in the evidentiary hearing. When advising a client whether he should testify on his own behalf, it is necessary for the attorney to help him weigh the pros and cons of doing so. The attorney can only do that if he finds out what the pros and cons are. Without this preparation, the attorney's assistance is constitutionally ineffective.

Again, the findings by the state and federal courts below on this issue are contrary to and an unreasonable application of *Strickland*, *supra*, and *Williams*, *supra*, and also unreasonable in light of the factual record in this case. The District Court erred in allowing summary judgment in favor of the Respondents and dismissing Petitioner Taylor's habeas corpus petition; therefore, the Fourth Circuit erred in finding no error by the District Court and in dismissing Petitioner's appeal and in refusing to grant a certificate of appealability.

CONCLUSION

For the foregoing reasons, taken jointly or severally, the above deficiencies by counsel at trial and on direct appear were ineffective under prior controlling decisions of this Court; and the Judgments of the courts below were contrary to the controlling decisions of this Court. For the foregoing reasons, this Court should grant certiorari in this case.

Respectfully submitted this 26th day of June, 2001.

THOMAS FRANKLIN LOFLIN III
Counsel of Record
LOFLIN & LOFLIN
P.O. Box 1315
Durham, N.C. 27702

Appendix A

JUDGMENT
UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 00-7529
CA-99-149-5-H

Entered: March 28, 2001

GREGORY FLINT TAYLOR,
Petitioner - Appellant,

v.

JOE HAMILTON, Secretary, North Carolina Department of Correction; LYNN PHILLIPS, Director of Prisons; MICHAEL BUMGARNER, Superintendent, Nash Correctional Center; MICHAEL EASLEY, Attorney General of North Carolina; STATE OF NORTH CAROLINA,
Respondents - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina at Raleigh

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In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

/s/ Patricia S. Connor
Clerk

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-7529

GREGORY FLINT TAYLOR,
Petitioner - Appellant,

versus

JOE HAMILTON, Secretary, North Carolina Department of Correction; LYNN PHILLIPS, Director of Prisons; MICHAEL BUMGARNER, Superintendent, Nash Correctional Center; MICHAEL EASLEY, Attorney General of North Carolina; STATE OF NORTH CAROLINA,
Respondents - Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Malcolm J. Howard, District Judge.
(CA-99-149-5-H)

Submitted: March 22, 2001
Decided: March 28, 2001
Entered: March 28, 2001

Before WILKINS, LUTTIG, and MICHAEL, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Thomas Franklin Loflin, III, LOFLIN & LOFLIN, Durham, North Carolina, for Appellant. Diane Appleton Reeves, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Gregory Flint Taylor appeals the district court's order denying relief on his petition filed under 28 U.S.C.A. § 2254 (West 1994 & Supp. 2000). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. Taylor v. Hamilton, No. CA-99-149-5-H (E.D.N.C. Sept. 12, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

FILED
SEP 12 2000
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

No. 5:99-HC-149-H

GREGORY FLINT TAYLOR,)
)
Petitioner,)
)
v.) **ORDER**
)
JOE HAMILTON, *et al.*,)
)
Respondents.)

Entered: September 12, 2000

Gregory Flint Taylor, a state inmate, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Respondents have moved for summary judgment, Petitioner has responded, and the matter is ripe for disposition.

STATEMENT OF THE CASE

On April 19, 1993, Petitioner was convicted following a trial by jury in the Superior Court of Wake County of first-degree murder and sentenced to life imprisonment. His appeal to the North Carolina Supreme Court was denied on September 9, 1994. He subsequently filed a motion for appropriate relief (MAR) in the Superior Court of Wake County and this was denied on December 10, 1998, following an evidentiary hearing. A petition for writ of certiorari was filed in the North Carolina Supreme Court. The petition was denied on March 4, 1999.

During his criminal proceedings, Petitioner was initially represented James Blackburn and R.L. Adams of Smith, Helms, Mullis, and Moore of Raleigh. When Balckburn had to withdraw from the case, Petitioner hired Michael Dodd to represent him and Adams continued to work with Dodd.

STATEMENT OF THE FACTS

The facts, as determined by the Supreme Court of North Carolina, show that Officer Brad Kenan saw a woman's body lying in the street on a cul-de-sac at the end of Blount Street in Raleigh, North Carolina at 7:30 a.m. on the morning of September 26, 1991. The dead woman's clothes were torn and pants were down around her ankles. The officer observed two holes in the victim's head and several cuts between her breasts. The victim was later identified by her finger prints as Jacquetta Thomas. Paraphernalia associated with the use of cocaine and crack cocaine were also found in the cul-de-sac. Petitioner's truck was found stuck at the end of a dirt road which led off the cul-de-sac. When Petitioner returned early that morning to retrieve his truck, the police were investigating the murder.

When Petitioner arrived at the scene, Detective Johnny Howard asked him to go to the police station for questioning. This interview was recorded. Petitioner told the police that he left home in his Pathfinder around 6:00 p.m. on September 25, 1991 and went to a friend's house where he stayed until about 9:30 p.m. He then went to another friend's house where he drank beer and became intoxicated. He then went to Johnny Beck's house around 11:30 p.m. where he smoked cocaine and drank more beer. He and Beck went to Beck's brother's house and stayed from around 1:00 a.m. until about 2:30 a.m., on September 26. Petitioner and Beck bought cocaine and drove into the cul-de-sac where the victim's body was found. He told police he did not see the body when they arrived. He stated that he

and Beck saw the service road and decided to go "four-wheeling" in his Pathfinder. They drove down the service road and became stuck in the ravine where they smoked more cocaine. He and Beck then got out of the truck and started walking north on South Blount Street when Beck saw the body in the cul-de-sac. After they walked further, Beck turned around and said he saw a person standing in the cul-de-sac. Petitioner then turned and saw the person. Beck and Petitioner walked to a busier street where they were picked up by a woman who drove them to a "rock" house. They stayed there using drugs until about 6:00 a.m. The woman drove Beck home and left Petitioner at a gas station where his wife picked him up. Petitioner repeatedly stated that he did know the victim, had not seen her before, and that she had never been in his vehicle.

Eva Marie Kelly testified that she was prostitute living at 419 East Street in southeast Raleigh o September 25, 1991. She stated that she saw a white man, whom she identified as Petitioner, and his black male passenger in her neighborhood that night and during the early morning hours of September 26. According to Kelly, the Pathfinder stopped in front of her house in the evening and she went up to the passenger door and spoke with the black man in the passenger seat. The black man asked if she wanted to get high and party with them. He displayed money and cocaine rocks and there was more cocaine in little plastic bags. Kelly did not get into the vehicle and the two men left.

When Kelly came home later in the evening, a black female named Jackie and one named Whoopie were in the kitchen with the two men she had seen earlier in the Pathfinder. Syringes were on the table and the group was smoking crack. Kelly left with her date, but when she returned she saw Jackie leaving by the kitchen door with the two men. She saw the Pathfinder traveling on Cabarrus Street and recognized it as the one she had seen earlier. She identified Petitioner as the man she saw with Jackie in the

kitchen and leaving with that night. She also identified him as the one driving the Pathfinder.

Ernest Andrews testified that he was in the Wake County Jail when Petitioner was placed in a cell with him. According to Andrews, he and Petitioner had several conversations while they were together. Petitioner told Andrews he was charged with murder. When another inmate asked Petitioner how the victim died, he responded that she died "with a smile on her face." Petitioner later added that she was "cut from ear to ear, throat cut."

William E. Hensley of the City-County Bureau of identification testified that technicians determined that the Pathfinder had been driven through the pool of blood found by the body. He further testified that the vehicle traveled in a northerly direction and circled around to the southwest before going over the curb and south up the gravel service road. Traces of blood were found on the passenger side front fender, passenger side A-frame and on the passenger side front wheel-well liner of Petitioner's Pathfinder. After a *voir dire* hearing, the trial court concluded the evidence that a purebread bloodhound had indicated the scent of the murder victim was in, on, or about the Pathfinder. The jury heard evidence that Officer Andy Currin took the bloodhound, Sadie, to the cul-de-sac and prepared a scent directly from the victim's body. After Sadie was presented with the scent and was commanded to "find," the dog headed southeast in a "zig-zag" manner to the gravel service road leading form the cul-de-sac and toward the Pathfinder. Sadie turned to Officer Currin indicating that the scent had stopped prior to or at the bottom of the embankment. Sadie was taken to the top of the ridge, about thirty feet from the Pathfinder and again given the command to "find." She circled searching for the victim's scent. When she was fifteen or twenty feet from the Pathfinder, she went directly to the driver's door and around to the passenger side door. She jumped both doors. Officer Currin testified that Sadie's actions indicated the victim's scent was in, on, or around the vehicle.

Dr. Deborah L. Radisch, Associate Chief Medical Examiner, testified that the autopsy she performed on the vicitms's body showed cuts and stab wounds. She concluded, however, that the cause of death was blunt force injuries to the head and neck. There was no evidence that the victim was struck by a vehicle. Drug testing revealed a very high concentration of cocaine in the body. The wounds indicated that the victim had been alive in the cul-de-sac and had been killed there.

At the close of the State's evidence and again at the close of all the evidence, Petitioner moved to dismiss the murder charge against him on the grounds that there was insufficient evidence that he committed the crime. Petitioner's motions were denied. Petitioner presented no evidence at his trial.

COURT'S DISCUSSION

I. Taylor's Ground's for Relief

As grounds for relief, Petitioner states: (1) trial counsel were ineffective for failing to object to testimony including out-of-court statements which were inadmissible hearsay; (2) trial counsel failed to adequately prepare for trial, in that they did not interview witnesses who were essential to Petitioner's defense; (3) trial counsel were ineffective for failing to adequately prepare to confront or cross-examine the testimony of the State's canine expert; (4) trial counsel were ineffective for failure to object to the testimony of Eva Marie Kelly, a prostitute, who testified in exchange for sentence concessions by the State in her own case; (5) trial counsel were ineffective for failure to object prosecutor's improper statements in his closing argument; and (6) trial counsel were ineffective for failing to adequately advise Plaintiff about whether he should testify in his own defense.

II. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The party seeking summary judgment must come forward and demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once the moving party has met its burden, the non-moving party must then affirmatively demonstrate that there is a genuine issue of material fact requiring trial. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). When making a summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes limitation on federal review of state court decisions. When reviewing habeas petitions involving claims adjudicated on the merits in state court, federal habeas may be granted only if the state court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d)(2).

In reviewing this case, we first determine that Petitioner's claims were adjudicated on the merits in the State court MAR hearing. Therefore, habeas may be granted only if the standard set forth above is met. Petitioner contends the State court decision on the merits of his claims as presented in his motion for appropriate relief was unreasonable and contrary to federal law.

A state court's decision is contrary to clearly established federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite to that reached by the Court on a question of law or if the state court decides a case differently than the Court has set of materially indistinguishable facts. *Williams v. Taylor*, 120 S.Ct. 1495, 1523 (2000). A state court decision involves an unreasonable application of clearly established federal law if the state court identifies the correct governing legal principle from the Supreme Court's decision but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The Fourth Circuit in *Fisher v. Lee*, 215 F.3d 438, 447 (4th Cir. 2000), in construing *Williams*, pointed out that "'an unreasonable application of federal law is different from an incorrect application of federal law.'" A federal court considering a habeas petition may not therefore issue a writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly, but may do so only if the application is also unreasonable. *Williams*, 120 S.Ct. 1523.

III. Ineffective Assistance of Counsel

The standard upon which claims of ineffective assistance of counsel are reviewed is that set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland* the petitioner must first show that counsel's performance was deficient by showing that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687. Second, a petitioner must show that the deficient performance prejudiced his defense. *Id.* The second component requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.*

In reviewing Petitioner's claims of ineffective assistance of counsel, it is important to look at the backgrounds and experience of the attorneys representing him. As noted above, Petitioner was initially represented by James Blackburn and R.L. Adams, from the law firm of Smith, Helms, Mulliss and Moore. The superior court found that Blackburn and Adams requested discovery from the state and enlisted to services of an experienced private detective, Randy Montague to supplement to discovery. (Order denying MAR p. 2). The court also determined that Blackburn and Adams spent approximately four hundred and fifty hours in investigation and preparation of the case. *Id.* When Blackburn was forced to withdraw, Adams continued to work on the case with L. Michael Dodd who was selected by Petitioner to replace Blackburn. Dodd had practiced criminal law for seventeen years, with his total practice involving the defense of criminal charges for the preceding ten years. *Id.* Dodd had represented more that sixty defendants charged with murder and has been qualified by the North Carolina State Bar Board of Legal Specialization as a specialist in the field of state and federal criminal law.

For the most, part Petitioner's contentions center around trial counsel's defense strategy. His claims that trial counsel were ineffective for failing to object to testimony including inadmissible out-of-court statements, failing to interview witnesses who were essential to his defense, failing to adequately prepare to confront or cross-examine the testimony of the State's canine expert, failing to object to Eva Marie Kelly's testimony, failing to object to prosecutor's improper statements in his closing argument, and failing to advise Petitioner as to whether he should testify in his own defense, all relate to trial tactics as gleaned form the record. Both Attorney Dodd, in his testimony in the post-conviction proceedings, and Attorney Adams, in his affidavit, contend that their defense strategy was to call no witnesses and leave it to the government to prove its case. Dodd further avers that his failure to object to the hearsay

statements was part of his strategy to point out the improper tactics used by the police to elicit statements from Petitioner and Johnny Beck, his co-defendant. Moreover, he states that he, after consulting with Petitioner and Adams, determined that it would be more to their advantage not to call witnesses in Petitioner's defense in order to preserve the right to have final closing arguments.

Unsuccessful trial tactics, standing alone, neither constitute prejudice nor definitively prove ineffective assistance of counsel. *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995), *cert. denied*, 518 U.S. 1009 ((1996). To succeed on an ineffective assistance of counsel claim, Petitioner must overcome the presumption that the challenged action may be considered an appropriate and necessary trial strategy under the circumstances. *Strickland*, 466 U.S. at 689. Whether or not Petitioner consented to trial strategy is probative of the reasonableness of trial counsels' performance. *See Bell*, 72 F.3d at 429.

There is no question concerning the credentials of the attorney's who represented Petitioner. Therefore, the court will first address Petitioner's contention that he was not properly advised as to the pros and cons of his testifying on his own behalf. Trial counsel state that they consulted with Petitioner regarding his right to testify, pointing out the pros and cons of Petitioner's taking the stand. However, Petitioner, in his affidavit states that he was not adequately advised by counsel as to whether he should take the witness stand. The state court, after thoroughly reviewing the evidence presented at the MAR hearing, concluded that there was no credible evidence that defendant was not adequately advised of his right to testify. Petitioner states in his affidavit that counsel's reasons for not allowing him to testify are inaccurate. However, even if the court were to determine that Petitioner was not adequately advised of his right to testify, there is no evidence to show that he was prejudiced as a result. Petitioner has not demonstrated that he could have offered any evidence in addition to that already before

the jury by way of the statements to the police following the incident. Therefore, the state court finding that Petitioner was fully and adequately advised of his right to testify at trial was not unreasonable under the circumstances, nor contrary to federal law as established by Supreme Court in *Strickland.*

Turning to Petitioner's contention that his attorneys were ineffective due to their failure to object to certain hearsay statements made by a co-defendant to the investigating officer. Mr. Dodd testified during the MAR hearing before Judge Farmer, that testimony concerning statements the co-defendant made which were contradictory to Petitioner's statement were hearsay. During his tape recorded interview, Petitioner stated that he and the co-defendant stated that he saw the body lying where the victim was later found, and that the co-defendant had called his attention to the fact that someone was standing in the circle over the victim's body. Mr. Dodd, without objection, allowed the State to elicit testimony from Detective Howard that the co-defendant did not see any other person near or around the body. Dodd claims he did not object and allowed the co-defendant's testimony as a trial tactic, because he wanted to ask the detective about his "unconscionable" tactics used in questioning both the co-defendant and Petitioner. (MAR tr. pp. 18-19.). The superior court rejected Petitioner's claim that trial counsel were ineffective for failing to object to the hearsay testimony of Detective Howard regarding a statement given to him by the co-defendant, Johnny Beck. Rather, the superior court pointed out that trial counsel were aware that Howard's statement would be objectionable hearsay, but as a part of their trial strategy wanted to use this as way to question the detective about the manner used to question each defendant and to show the jury that in spite of the "unconscionable" tactics, both Petitioner and Beck continued to deny involvement in the murder. (Order denying MAR p. 4). The superior court concluded that trial counsel did illicit testimony in length about questionable methods used by the detective and

testimony concerning both defendants' assertions of innocence. Therefore, the court's findings that trial counsel's actions were reasonable and that Petitioner was not prejudice as a result are not contrary to, nor do they involve an unreasonable application of the standard set forth in *Strickland*.

Petitioner-next contends trial counsel was ineffective for failing to adequately prepare for trial because they did not interview witnesses who were essential to his defense. Petitioner specifically argues that counsel did not try to find witnesses who were in the cell with Petitioner and Ernest Andrews, the inmate who testified that Petitioner made a jailhouse confession. In this case, counsel had a transcript of Andrews' tape recoded statement and thus they were aware of the nature of his testimony. Andrew's statement that there were other inmate's present when Petitioner allegedly made the first statement incriminating himself, indicated that there were other potential witnesses who could have possibly refuted Andrews' testimony. In his affidavit, R. L. Adams stated that Petitioner suggested that they have some of the inmates from his cellblock testify. Adams, however, states that this idea was not followed through on because none of the inmates were with Petitioner for twenty-four hours a day and therefore could not testify that it was impossible for Petitioner and Andrews to have dad the conversation. Apparently, Petitioner's current counsel was able to find witnesses who also shared the jail cell with Petitioner when he was first arrested. After reviewing the testimony of the two inmates, Judge Farmer determined that they gave little evidence of value which would tend to refute Andrews' statements. A review of the testimony of the witnesses who supposedly would have aided Petitioner's defense shows that their testimony would have offered little or nothing to rebut Andrew's assertions concerning Petitioner's jailhouse confession. (*See* MAR tr. pp. 3-33). At most, their testimony merely demonstrated that Petitioner never confessed to them. Thus, the court concludes that Petitioner

was not prejudiced by trial counsel's the tactical choice and their decision not to use these witnesses did not amount to profession dereliction.

Petitioner claims that trial counsel's deficiencies in failing to obtain an expert to deal with the bloodhound evidence and to object to tainted identification evidence were prejudicial under the *Strickland* standard. The evidence in question has to do with the testimony concerning the trailing of the victim's scent to Petitioner's vehicle which was stuck near a service road off the circle and the identification of Petitioner by Eva Marie Kelly.

With regard to the bloodhound evidence, the record shows that counsel objected at trial to this evidence and that there was an extensive *voir dire* hearing. Through a suppression motion and cross-examination trial counsel demonstrated the recognition of the legal issues involved in this kind of testimony. Moreover, the evidence provided at the MAR hearing by Jonni Joyce, who at the time was a sergeant with the Zebulon Police Department and a professional canine trainer, shows that such rebuttal evidence would not have aided Petitioner's defense. Instead, this merely served as a look at the evidence in hindsight not as an indication of any deficient performance on the part of trial counsel in dealing with this evidence.

Respondent argues, however, that even if the failure of the attorneys to hire a separate bloodhound expert amounted to ineffective assistance, there was no prejudice because the bloodhound evidence was duplicative. Respondent concludes that the Kelly's testimony placed the victims in Petitioner's presence and in his car shortly before she was killed.

Even so, Petitioner asserts that trial counsel was ineffective for failure to object to the testimony of Kelly who testified in exchange for sentence concessions. He contends the identification was the result of an impermissibly suggestive photo "showup." The state court found, following the MAR proceeding, that "based on the

circumstances of the witnesses' viewing, twice outside at close range and once face to face in the lighted kitchen and the certainty of her identification only a short time after seeing the defendant would have allowed her identification even if the original photo viewing was suggestive." (Order denying MAR p. 6). This determination by the state court is reasonable in view of the fact that Kelly had at least one good opportunity to see Petitioner when he and his co-defendant called her to his truck, thus establishing that the in-court identification had an independent origin. *See Simmons v. United States*, 390 U.S. 377 (1968).

Finally, Petitioner claims counsel were ineffective for failing to object to prosecutor's improper statements in his closing argument. The allegedly improper arguments were as follows: (1) "[g]enerally, in a homicide, there's two kinds of parties there, the victim who can't say anything, and the perpetrator, who won't say anything;" (2) "[t]he defendant has got to explain something to you;" and (3) "[i]t's your duty to speak for the people of the State of North Carolina when there's another side to what Mr. Dodd says and I know y'all will do that even though I can't do it because obviously I'll be sitting there with my turn having come and gone but don't think that I'm not wishing that I had, that I'm not wishing that I had spoken about something that he mentioned when there's another side." Petitioner contends these comments as found in 1 and 2, violate his right not to be a witness. The court finds that these comments alone, although improper, did not prejudice Petitioner where they were not extensive. Similarly, the court finds that comment 3, which was an isolated comment did not prejudice Petitioner. The court therefore determines that trail counsel was not ineffective for failing to object to the comments at issue.

CONCLUSION

Accordingly, the court finds that the evidence viewed as a whole, does not raise a reasonable probability that the result of Petitioner's trial would have been different were it not for counsel's deficient performance and that Petitioner has failed to demonstrate the existence of genuine issues of material fact. Therefore, the court having found no violations of federal or constitutional laws, Respondent's motion for summary judgment is GRANTED as to all claims raised in Petitioner's habeas corpus petition.

SO ORDERED this 11th day of September 2000.

\s\ _____
MALCOLM J. HOWARD
United States District Judge

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
Untied States District Court
Eastern District of
North Carolina

By \s\ _____
Deputy Clerk

Appendix C

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CRS 71728

STATE OF NORTH CAROLINA
WAKE COUNTY

STATE OF NORTH CAROLINA

v.

GREGORY F. TAYLOR

ORDER DENYING MOTION FOR APPROPRIATE RELIEF

Entered: December 10, 1998

This cause coming on to be heard and being heard before the undersigned Superior Court Judge presiding upon the defendant's Motion for Appropriate Relief filed April 21, 1997 and defendant's Motion to Amend Motion for Appropriate Relief filed sometime on or after November 2, 1998. The hearing took place in part on April 3, 1998, May 15, 1998, and was finally completed on August 21, 1998. The Court having read and reviewed all documents filed of record in the official court file of the above captioned case including the trial transcript, having received the sworn testimony of witnesses offered by defendant, having received exhibits; and having read the written arguments of counsel for the State and defendant, makes the following:

FINDINGS OF FACTS

1. The defendant, Gregory F. Taylor, was personally present in open Court during the entirety of the hearing with his retained counsel, Thomas F. Loflin III; the State was represented by Assistant District Attorney, R. Thomas Ford.

2. The hearing was held in the absence of a jury.

3. The Court had the opportunity to see and observe each witness who testified at the hearing and to determine what weight and credibility to give the testimony of each witness.

4. The defendant's Motion for Appropriate Relief alleged the conviction at trial in the above captioned case was unconstitutionally obtained in that defendant's trial counsel, L. Michael Dodd and R.L. Adams rendered ineffective assistance of counsel.

5. The defendant's Motion for Appropriate Relief alleged ineffective assistance of counsel in the following respects:

    a) by failing to object to Detective Johnny Howard's testimony regarding his interview with co-defendant, Johnny Beck.

    b) by failing to properly investigate the case prior to trial and with specific reference to jail inmates who could contradict the making of a "jailhouse confession" by the defendant testified to by a witness at trial, Ernest Andrews.

c) by failing to object to the testimony of Eva Marie Kelly identifying defendant as one of the men decedent was with the night of her death.

d) by failing to object to certain final arguments of the prosecutor.

6. The defendant's Motion to Amend Motion for Appropriate Relief further alleged ineffective assistance of counsel in the following respects:

a) by failing "to advise defendant adequately regarding his right to testify."

b) by failing "to call an expert witness to explain the actions of the police dog in a manner consistent with innocence."

7. Defendant was arrested and charged with the murder herein on September 26, 1991 and shortly after his arrest defendant employed James Blackburn (herein after referred to as Blackburn) and R.L. Adams (herein after referred to as Adams) to represent him to the conclusion of the trial of the matter.

8. Blackburn and Adams requested and received "full discovery" from the State.

9. Blackburn and Adams enlisted the services of an experienced private detective, Randy Montague, to supplement the discovery in investigation and preparation of their case; Mr. Montague, a former Wake County Sheriff's Department detective, spent from fifty to eighty hours searching for and interviewing potential witnesses and attempting to develop evidence advantageous to the defendant.

10. Defendant's family also employed a separate detective, Larry Morrisey to aid in developing exculpatory evidence and defendant's counsel were also privy to his findings.

11. Blackburn and Adams spent approximately four hundred and fifty hours in investigation and preparation of the case.

12. Prior to February 1993, Blackburn who had lost his privilege to practice law in North Carolina was forced to withdraw and his firm, Smith, Helms, Mulliss and Moore, agreed that they would allow defendant to replace Blackburn with the attorney of defendant's choice and the firm would pay the replacement. Adams would also remain on the case as attorney for defendant also because he was familiar with the case.

13. In February, 1993 defendant considered several attorneys to replace Blackburn as a trial lawyer and chose L. Michael Dodd (herein after referred to as Dodd) an attorney defendant had earlier contacted immediately after his arrest for advice in this matter.

14. Dodd, a Wake County attorney, had practiced criminal law for seventeen years; one hundred percent of his practice had involved the defense of criminal charges for one preceeding ten years.

15. Dodd had qualified for and been placed upon Wake County Bar's list "4A", those certain attorneys approved to serve as "first chair" for indigent defendants in capital cases.

16. Dodd has represented in excess of sixty defendants charged with murder, more than half of which were death penalty cases.

17. Dodd has been qualified by the North Carolina State Bar Board of Legal Specialization as a specialist in the field of State and Federal criminal law.

18. Upon his being retained to represent defendant at the trial of the case with Adams who continued with the defense team, Dodd, spent almost everyday for a period of time until he had reviewed every document in the file, including the original discovery information, additional investigation by private detectives and the original attorneys as well as any work product the attorneys had produced.

19. During the one hundred and twenty plus hours of trial preparation Dodd found the work done by Blackburn and Adams to have been very thorough and complete.

20. Dodd and Adams went to Chapel Hill, North Carolina and personally interviewed Dr. Deborah Radisch, the State's pathologist and medical examiner in preparation for trial.

21. Dodd and Adams employed former Chief Medical Examiner of North Carolina, Dr. Page Hudson and met with him for a day going through the medical examination discovery so they would be better prepared to cross examine Dr. Radisch and to develop certain arguments involving that evidence.

22. Early during the involvement of Mr. Dodd in the case, the attorneys determined and agreed that they considered the State's case was weak in areas and that the best trial strategy would be to not aid the State in producing evidence of any element of the crime and to attempt to focus first on those weaknesses and failings to procure nonsuit. Further Dodd and Adams felt it was best trial strategy to preserve final arguments, if possible, should the case get past nonsuit.

23. Dodd and Adams discussed this strategy with defendant as it was being devised and the defendant concurred with that strategy.

24. Dodd, based on all his contact with defendant, found defendant to be an intelligent young man who appeared to understand the legal arguments and factual representations being made to him.

25. Trial of the matter commenced on April 13, 1993 and was concluded on April 19, 1993 and the defendant, who was free on bond, was represented at the trial by Dodd and Adams.

26. The defendant was convicted of first degree murder and sentenced to life in prison from which judgment he appealed directly to the North Carolina Supreme Court.

27. The Supreme Court of North Carolina reviewed the case and on September 9, 1994 filed an opinion in which the Court found that the defendant had received a fair trial free from prejudicial error.

28. Thereafter defendant through his attorney, Thomas Loflin, III filed this Motion for Appropriate Relief alleging the six separate manifestations of ineffective assistance of counsel heretofore set forth.

29. The closing arguments of the prosecutor which defendant contends in this motion amounted to an unconstitutional comment on defendant's election not to testify were reviewed directly by the North Carolina Supreme Court which found that these same arguments, when taken in contest, "did not amount to an impermissible comment on defendant's failure to testify."

30. The arguments were not objectionable as impermissible comments by prosecutor on defendant's failure to testify and counsel failure to object thereto was not erroneous.

31. The third argument defendant complained of, when taken in context, is a paraphrase of the jury's duty as set forth in North Carolina Pattern Instructions - Criminal Section 101.35 and is not improper or objectionable and counsels failure to object thereto was not erroneous.

32. Defendant contends that trial counsel were ineffective in that they failed to object to hearsay testimony by Detective Howard regarding a statement given to him by the codefendant Johnny Beck.

33. Trial counsel were aware that such a statement would be objectionable hearsay. Trial counsel were desirous as part of a trial strategy, to question the detective about the unconscionable manner in which he questioned each defendant in an effort to obtain a confession, (i.e. telling each that the other had claimed that his codefendant had committed the murder.) Further trial counsel wanted the jury to know that inspite of these tactics that both defendant and codefendant Beck had continued to deny involvement by themselves or their codefendant.

34. Trial counsel had discussed the case with Randolph Riley, attorney for codefendant Beck, and had been told that he would not allow Beck to testify for the defendant.

35. Trial counsel purposefully did not object to the hearsay statement of Beck when prosecutor attempted to illicit same because they realized it "open the door" for them to obtain evidence of codefendant's continued denial of the guilt of either defendant even in the face of the unconscionable tactics used by the police in their attempts to obtain a confession.

36. Trial counsel did illicit testimony in length about the questionable methods used by the detective as well as the defendant's and codefendant's steadfast assertion of innocence despite the use of said tactics.

37. Defendant contended that trial counsel were ineffective for failure to fully investigate the validity of the testimony of former jail inmate Ernest Andrews.

38. Mr. Andrews who had been an inmate in the jail with defendant immediately after defendant's arrest testified that defendant made a somewhat inculpatory statement to him in jail.

39. Defendant's counsel became aware of this statement through discovery and thereafter sent Detective Montague to a prison unit in eastern North Carolina to determine if Andrews would testify and if he did, what he would say.

40. Andrews statements to Montague made trial counsel doubt that he would testify.

41. In Dodd's discussions with defendant while preparing for trial, defendant told Dodd he did not make the statement and that Andrews was lying. Defendant gave Dodd no indication that there were inmates who could refute the statement. Dodd instead prepared to cross examine Andrews about his ulterior motives and his extensive criminal record for crimes involving moral turpitude.

42. Defendant called two former inmates to testify at the hearing on the Motion for Appropriate Relief and that they, too, were in jail with defendant immediately after his arrest. They, Shane Todd and Paul Eastridge, both with extensive an serious criminal backgrounds, testified that although they heard defendant discuss the circumstances of his arrest, they never heard him make an inculpatory statement. These witnesses had given information about the version of the incident (murder) that defendant had given, each of them from which a detective had drawn affidavit. The affidavits are somewhat in conflict with each other as to the events defendant reported.

43. Todd and Eastridge testified that they were in "E" block of the Wake County Jail during the relevant time; which cell block composed of six four-man cells and that there were many others sleeping on the floor of the crowded cell block. Each testified that they had no idea to whom defendant spoke during periods of time.

44. Little evidence of value, if any, tending to refute the statements of Ernest Andrews was elicited from these inmate witnesses who defendant described as the people who knew him best while he was in jail at that time.

45. Defendant would have had to relinquish last argument to gain the testimony of these questionable witnesses and would have gained very little, if anything, toward damaging the State's case.

46. Defendant suffered no prejudice by trial counsel's adherence to the trial strategy of securing last argument by not calling these two career criminals in order to obtain the testimony they provided.

47. Defendant contended that trial counsel were ineffective for failing to object to the testimony of Eva Marie Kelly, a prostitute identifying the defendant as being one of the men that was with the decedent the night she was killed.

48. Ms. Kelly's trial testimony revealed that on the night of the murder, the defendant and codefendant approached her in defendant's vehicle and offered her money and cocaine to go "party" with them. She saw them and spoke to them from within arms reach. Later she had a conversation and confrontation in her

lighted kitchen with the defendant, codefendant and "the girl Jackie" (the decedent) over the fact that they were using cocaine in a manner which frightened the "john" whom Ms. Kelly had with her. Later she saw these three leave in defendant's truck.

49. The day after the murder police canvassed the area of Ms. Kelly's home showing pictures of defendant, codefendant, and defendant's automobile and asking if anyone had recognized the vehicle and/or the defendant and codefendant. Ms. Kelly viewed the photographs before being given information regarding the crime and she told the officer that she had seen them and under what circumstances. Ms. Kelly did not originally tell the police of the confrontation inside her home.

50. This form of neighborhood canvassing and searching for possible witnesses by police officers did not amount to an impermissibly suggestive identification procedure so as to taint the witnesses' in-court identification of defendant. Further, based on the circumstances of the witnesses' viewings, twice outside at close range and once face to face in lighted kitchen and the certainty of her identification only a short time after seeing the defendant would have allowed her identification even if the original photo viewing was suggestive. This is so especially in light of the fact that defendant's own statement to police placed him in this neighborhood with the codefendant, in the automobile in question at the time the witness named.

51. The in court identification of the defendant by the witness Kelly was not objectionable and should have been allowed even if and objection had been lodged.

52. Defendant was not prejudiced by trial counsels' failure to so object.

53. Defendant alleged that trial counsel were ineffective because they failed to adequately advise the defendant regarding his right to testify.

54. Trial counsel had developed a dual trial strategy to both avoid providing any witness or evidence from which the prosecution might garner evidence of any element of the crime and also to preserve last argument if possible. Defendant was fully informed of this strategy and had approved this strategy. Trial counsel was of the opinion that defendant should not testify after the State's evidence in furtherance of both strategies.

55. At the close of the State's evidence trial counsel met with defendant to let him decide if he would testify in the trial. Defendant had been personally present through the entirety of the State's case, including his lengthy statement to police in which he explained his vehicle being at the scene, explained his presence there, and vehemently denied any involvement in the death by himself or codefendant. Defendant knew his trial testimony would only repeat that evidence.

56. Trial counsel believed that ultimately the decision as to whether defendant testified in any criminal case was solely that of the defendant. Trial counsel advised defendant that in their opinion he should not testify. After fully discussing the situation with trial counsel and trial counsel going over everything that had happened in the case to that point with defendant, defendant informed them that he agreed and still felt that he should not testify.

57. There is no credible evidence that defendant was not adequately and fully advised of his right to testify at trial nor that he was coerced in any way into his decision not to testify.

58. The defendant alleges that trial counsel were ineffective in that they failed to call an expert witness to explain the actions of the police dog in a manner consistent with innocence.

59. At trial the State called former police officer, Andy Currin who had been a canine handler for the Raleigh Police Department at the time of the murder who had taken a pedigreed bloodhound named "Sadie" to the murder scene. "Sadie" was "keyed" on the scent of the victim and given the command to "find". "Sadie" eventually "trailed" to the defendant's vehicle which was some distance away and out of sight. There "Sadie" gave indication that the scent was present in or on the vehicle.

60. Trial counsel objected to this testimony at trial and an extensive voir dire hearing was had. Trial counsel at that time demonstrated that they had recognized the evidentiary legal issues brought about by the unusual way the bloodhound was used and were prepared to challenge its validity and probative value.

61. The State prevailed in the hearing and the canine evidence was admitted over defendant's counsel's objection. The North Carolina Supreme Court reviewed the canine evidence extensively and found it to have met the tests of admissibility pertaining to such evidence and therefore properly admitted.

62. However trial counsel were successful in challenging the weight this evidence should have with the jury in cross examination of Currin by getting him to admit that he was skeptical of the validity of the process he was asking "Sadie" to perform. He was concerned to the point that he had expressed his feelings to his superiors that the dog was not trained for what she was being asked to do.

63. Prior to the time the defendant could have called an expert in rebuttal of the canine evidence, Eva Kelly, the prostitute had already testified that defendant and codefendant had attempted to get her in the vehicle and that later she had seen the decedent in the vehicle, which was all the canine evidence could possibly indicate, (i.e. that decedent had been in or around the vehicle.)

64. Defendant was not prejudiced by trial counsels' failure to call a rebuttal "canine witness" and counsels' preservation of last argument.

65. The Court has assessed trial counsel's performance with effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsels' challenged conduct, and to evaluate the conduct from counsels' perspective at the time. The Court has evaluated counsels' performance on the whole.

Based upon the foregoing facts, the Court makes the following:

CONCLUSIONS OF LAW

1. The trial preparation and performance of defendant's counsel, L. Michael Dodd and R.L. Adams was not deficient and was well above an objective standard of reasonableness and counsel made no error so serious that said counsel was not functioning as "counsel" guaranteed under the Sixth Amendment.

2. That in regards to said trial, defendant was not prejudiced by the performance of counsel and defendant was not deprived of a fundamentally fair trial, the result of which was reliable.

3. Defendant's conviction was not obtained in violation of the Constitution of the United States or the Constitution of North Carolina in any manner asserted in his original Motion for Appropriate Relief or as amended.

4. Defendant was tried upon a valid Bill of Indictment and had a fair and impartial trial; none of his constitutional or other legal rights were denied or violated in any respect before, during or after his trial.

5. Defendant is imprisoned by virtue of a legal and final Judgment of a Court of competent Juristriction and he is not unlawfully restrained of his liberty; that the time that defendant may be legally detained is not expired, and that the Defendant should be remanded to the custody of the North Carolina Department of Corrections.

6. Defendant's failure to assert any other grounds for relief at the hearing herein should be subject to being treated in the future, and pursuant to G.S. 15A-1419, as a bar to any and all other claims, assertions, Petitions, or Motions that defendant might hereafter file in this matter.

7. The Motion for Appropriate Relief (as amended) that his conviction be set aside and that he be granted a new trial and other relief should be denied.

Based on the foregoing findings of fact and conclusions of law, it is now, therefore,

ORDERED that:

1. The Motion for Appropriate Relief (as amended) filed herein and dated April 21, 1997 and the prayer for relief therein is hereby in all respects denied.

2. Defendant is remanded to the custody of the North Carolina Department of Corrections immediately to complete service of his sentence as provided by law.

3. Defendant's failure to assert any other grounds for relief at the hearing herein shall be subject to being treated in the future, and pursuant to General Statute 15A-1419, as a bar to any and all other claims, assertions, Petitions, or Motions that he might hereafter file this matter.

4. Copies of this Judgment shall be forwarded by the Clerk of Superior Court of Wake County to the Defendant, counsel for the Defendant, Thomas R. Loflin III, the Secretary of the North Carolina Department of Corrections; and the District Attorney, Tenth Judicial District.

Entered out of term and out of session with the consent of the Defendant, his counsel, Thomas F. Loflin III, and the Assistant District Attorney.

This the 10th day of December, 1998.

/s/ _____
Robert L. Farmer
Judge Presiding

Appendix D

No. 482A93-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(State v Gregory Flint Taylor)

STATE OF NORTH CAROLINA

v

GREGORY FLINT TAYLOR

From Wake
(91CRS71728)

****

ORDER

Upon consideration of the petition filed by Defendant in this matter for a writ of certiorari to review the order of the Superior Court, Wake County, the following order was entered and is hereby certified to the Superior Court of that County:

"Denied by order of the Court in conference, this the 3rd day of March 1999.

s/ Wainwright, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of March 1999.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

\s\ Carol B. Templeton
Assistant Clerk

Copy to:

Mr. Thomas F. Loflin, III, Attorney at Law, For Taylor
Mr. William N. Farrell, Jr., Senior Deputy Attorney General, For State
Mr. C. Colon Willoughby, Jr., District Attorney
Mr. John M. Kennedy, Clerk of Superior Court
Mr. Ralph A. White, Appellate Court Reporter
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